

Lawyers, Clients, and AIDS: Some Notes from the Trenches

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Preface

This Article is for the practitioner who chooses to represent PWA's¹ and for the practitioner who realizes that representing PWA's is inevitable. At this writing, over 64,000 persons have been diagnosed with AIDS,² and experts believe that between 1 and 1.5 million other Americans have been infected with the HIV virus.³ Based on statistics alone, few lawyers will be unaffected by AIDS issues in the near future. Moreover, few legal fields will remain untouched by the disease. Already, AIDS issues have surfaced in the following areas: employment law,⁴ insurance

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1. The letters PWA stand for Persons With AIDS. PWARC stands for persons with AIDS-related complex. The PWA descriptor is the preferred name selected by people who have AIDS who specifically do not wish to be described as victims. The term "victim" is dehumanizing and fails to emphasize the strength of the individuals living with and fighting against the disease. Further, referring to some people with AIDS as "innocent victims" creates the impression that others are guilty or deserving of the disease. Such moral judgments only lead to more discrimination. The Mission Statement of the National Association of People With AIDS (NAPWA) states: "We do not see ourselves as victims. We will not be victimized. We have the right to be treated with respect, dignity, compassion and understanding. We have the right to lead fulfilling, productive lives—to live and die with dignity and compassion." Copies of the Mission Statement and other information on the organization can be obtained from NAPWA, 2025 Eye Street N.W., Washington, D.C. 20006.

2. CDC, *AIDS WEEKLY SURVEILLANCE REP.*, June 6, 1988.

3. *PHS Conference Estimates 365,000 Cases Through 1992*, 3 *AIDS Pol'y & L.* (BNA) No. 11, at 5 (June 15, 1988).

4. *See, e.g., Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988) (schoolteacher barred by school board from returning to the classroom; U.S. District Court refused to issue preliminary injunction ordering his reinstatement, *Doe v. Department of Education*, 44 Fair Empl. Prac. Cas. (BNA) 1579 (C.D. Cal. Sept. 8, 1987); Ninth Circuit reversed district court and granted the injunction, holding that there was no evidence of any significant risk to the school children); *Shuttleworth v. Broward County*, 649 F. Supp. 35 (S.D. Fla. 1986) (county employee diagnosed with AIDS was fired; Florida Commission on Human Affairs ruled in 1985 that AIDS is a handicap, *Shuttleworth v. Office of Budget and Management Policy*, FCHR No. 85-0624 (Dec. 11, 1985); Shuttleworth then brought suit in federal district court claiming a violation of his rights on equal protection and due process grounds and under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1982 & Supp. III 1985); the case survived a motion for summary judgment, *Shuttleworth v. Broward County*, 639 F. Supp. 654 (S.D. Fla. 1986); case settled three days before trial with employer agreeing to rehire Shuttleworth and pay him \$196,000 (reported in 1 *AIDS Pol'y & L.* (BNA) No. 24, at 1 (Dec. 17, 1986))); *Raytheon Co. v. Fair Employment & Housing Comm'n*, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. Aug. 4, 1986) (on appeal to California Supreme Court) (court upheld Commission ruling that AIDS is a physical handicap under the California Fair Employment & Housing Act and agreed that John Chadbourne was unlawfully discriminated against when denied reinstatement to his job after being hospitalized with AIDS); Rehabilitation Act of 1973, 29 U.S.C. §§

law,⁵ administrative law,⁶ tort law,⁷ housing law,⁸ criminal law,⁹ constitutional law,¹⁰ estate planning,¹¹ public health law,¹² and family law.¹³ Representing persons who have AIDS or who are HIV seropositive¹⁴ poses both professional and personal challenges to attorneys. Both types of challenges will be discussed in this Article. This Article provides the practitioner with insight into the role of the lawyer in the unique and complex medical-legal problem that is AIDS. For the lawyer, working

701-96 (1982 & Supp. IV 1986) (amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (Mar. 22, 1988)).

5. See, e.g., *Zachary Trading v. Northwestern Mut. Life Ins. Co.*, 668 F. Supp. 343 (S.D.N.Y. 1987) (insurer claimed nondisclosure of prior visits to physicians was a misrepresentation under New York law and denied claims by insured PWA; court held such misrepresentations were material and denied relief to insured); *Cheney v. Bell Nat'l Life Ins. Co.*, 520 A.2d 402 (Md. App. 1987) (insured contracted AIDS from blood transfusion; subsequent death could not be termed accidental under the death policy); *State Examines Redlining Charges*, 1 AIDS Pol'y & L. (BNA) No. 22, at 3 (Nov. 19, 1986) (complaint filed with California Department of Corporations charged that Health American rejected individual membership applications from San Francisco to avoid presumed high-risk persons).

6. See, e.g., Supplemental Security Income for the Aged, Blind, and Disabled; Presumptive Disability and Blindness; Impairments which may warrant a finding of presumptive disability or presumptive blindness, 20 C.F.R. § 416.934(k) (1988) (AIDS added to categories of presumptive disability based on predictability that the disease will result in a finding of disability); *Woman With ARC Entitled to Disability Benefits*, 1 AIDS Pol'y & L. (BNA) No. 11, at 4 (June 18, 1986) (administrative law judge ruled woman was disabled under meaning of the Social Security Act and entitled to supplemental security income).

7. See, e.g., *Doe v. Miles Laboratories, Inc.*, No. R-86-2548 (D. Md. Dec. 14, 1987) (defendant's motion for summary judgment denied; plaintiff claimed strict product liability for contracting ARC from defendant's blood coagulation factor) (copy of decision on file with the Ohio State Law Journal); Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 TORT & INS. L.J. 165 (1987); Hermann & Gorman, *Hospital Liability and AIDS Treatment: The Need for a National Standard of Care*, 20 U.C. DAVIS L. REV. 441 (1987).

8. See, e.g., *Poff v. Caro*, No. HJO6W 04389F (N.J. Super. Ct. Mar. 12, 1987) (landlord allegedly refused to rent to three gay men due to fear that they would develop AIDS; court granted a preliminary injunction restraining the landlord from otherwise renting the apartment and held that state handicap law bars a refusal to rent under such circumstances) (copy of decision on file with the Ohio State Law Journal); Chibbaro, *Council Amends Zoning Law to Stop Closing of AIDS Home*, Washington Blade, Apr. 22, 1988, at 3; *California Suit Seeks Realty Disclosure*, 1 AIDS Pol'y & L. (BNA) No. 2, at 6 (Feb. 12, 1986).

9. See, e.g., *California v. Markowski*, No. A-953578 (Los Angeles Super. Ct. Mar. 2, 1988) (jury acquitted HIV carrier on two counts of attempted poisoning for trying to sell his blood); *Haywood County v. Hudson*, 740 S.W.2d 718 (Tenn. 1987) (Tennessee Supreme Court ordered HIV antibody test of murder suspect who told officers upon arrest that he had AIDS); *People v. Jacobs*, N.Y.L.J., Aug. 22, 1986, at 14, col. 1 (N.Y. Sup. Ct.) (burglary charges against PWA dropped because defendant was in advanced stage of AIDS and not a serious threat to the community).

10. See, e.g., Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Comment, *The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome—AIDS*, 37 EMORY L.J. 217 (1988); Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986).

11. See, e.g., *Evans v. Bellevue Hosp.*, N.Y.L.J., July 28, 1987, at 11, col. 1 (N.Y. Sup. Ct.) (judge ruled "living will" of PWA was ambiguous and refused to order medical treatment stopped); *Estate of Thaler*, N.Y.L.J., Oct. 3, 1985, at 7, col. 1 (N.Y. Sur. Ct.) (parents of decedent PWA sought to vacate probate decree and filed objections to the will that appointed decedent's "companion" as executor; judge refused to vacate the previous decree); *Challenges Rise Sharply on AIDS Victims' Wills*, N.Y. Times, Feb. 19, 1987, at 16, col. 1.

12. See, e.g., Matthews & Neslund, *The Initial Impact of AIDS on Public Health Law in the United States—1986*, 257 J. A.M.A. 344 (1987); Perkins & Boyle, *AIDS and Poverty: Dual Barriers to Health Care*, 19 CLEARINGHOUSE REV. 1282 (1986).

13. See, e.g., *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. App. 1988) (Indiana Court of Appeals reversed state superior court ruling that prevented a man from visiting his daughter because he was HIV seropositive); *Doe v. Doe*, 18 Misc. 2d 1015, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987) (judge dismissed wife's claims of fraud and intentional infliction of "AIDS-phobia" against husband who informed her of his homosexuality and his negative test result); Comment, *The Effect of AIDS on Child Custody Determinations*, 23 GONZ. L. REV. 167 (1987/88).

14. Testing positive to the HIV antibody test indicates that the individual has produced antibodies in reaction to exposure to HIV. It does not directly test for AIDS or the virus. The Public Health Service recommends that a person be classified as HIV seropositive only after a series of tests. *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 509, 510 (1987). The most common test is the ELISA. This test was developed to protect the blood supply, and thus is overly sensitive. The result

with the problems of clients who are HIV seropositive or have AIDS goes beyond the application of settled substantive law. AIDS does not fit neatly into settled legal boundaries; solutions to AIDS issues have stretched those boundaries and often broken them. The issues presented by AIDS have proven a number of traditional legal solutions inadequate; they require creative and innovative lawyering. This Article is not a treatise on the substantive areas touched by the disease. Rather, it discusses strategy and tactics in each legal area in the context of the individual client's needs. AIDS has not only strained the boundaries of the law, but the boundaries of the role of the lawyer as well. This Article discusses and questions that role.

Those who wish to explore the substantive areas in depth should consult the footnotes for references to helpful sources. Names and addresses of organizations and individuals who have specialized knowledge to assist lawyers who represent PWA's are also included in the footnotes. Quite often, the discussion presumes some knowledge of a particular legal area; if the reader is missing some of the assumptions, she should consult the footnotes for references to relevant legal periodicals or treatises.

Finally, this material is demographically and geographically limited. I practice in an area of the Midwest where my clients are predominantly white, male, and gay or bisexual. A person practicing on the East Coast or in Florida would probably represent drug users, minorities, or the economically disadvantaged more frequently. The issues of drugs, race, and poverty, and their relation to AIDS clients are critical but are beyond the scope of this Article.

I. AIDS—THE DISEASE: INTRODUCTION

This Article does not describe or explain AIDS as a disease. The reader is presumed either to be well read in the area or to be embarking on that task. For an overview of the disease, I suggest the following materials, which should be readily accessible in any law library: *AIDS and the Law*, edited by H. Dalton and S. Burns; *AIDS—An Acquired Community Problem*, by Barbara A. Breen; *AIDS and Employment Law Revisited*, by Arthur S. Leonard; and *Between a Rock and a Hard Place: AIDS and the Conflicting Physician's Duties of Preventing Disease Transmission and Safeguarding Confidentiality*.¹⁵

is an occasional false positive. INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCE, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 113-14 (1986). Therefore, a second ELISA, followed by the more specific Western Blot test, is recommended. *Id.* at 305-06. A negative antibody test does not conclusively indicate the absence of HIV. Antibodies usually develop within 6-12 weeks following exposure to the virus. Tests taken within this period can yield false negatives. Marlink, Allan, McLane, Essex, Anderson & Groopman, *Low Sensitivity of ELISA Testing in Early HIV Infection*, 315 NEW ENG. J. MED. 1549 (1986).

Further, being HIV seropositive does not indicate that the individual has AIDS. AIDS is a clinically diagnosed disease in which HIV seropositivity is but one factor. See *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MORBIDITY AND MORTALITY WEEKLY REP. Supp. No. 1S (1987).

15. See Osborne, *The AIDS Epidemic: Discovery of a New Disease*, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 17-36 (H. Dalton & S. Burns ed. 1987); Breen, *AIDS—An Acquired Community Problem*, 32 MED. TRIAL TECH. Q. 249, 249-56 (1986); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 16-20 (1985); Note, *Between a Rock and a Hard Place: AIDS and the Conflicting Physician's Duties of Preventing Disease Transmission and Safeguarding Confidentiality*, 76 GEO. L.J. 169, 170-75 (1987). For a more in-depth discussion of the medical aspects,

A. *Some General Rules for Dealing with AIDS Clients*

From my practice representing persons who have AIDS or who are HIV seropositive, I have come up with six general rules: (1) the attorney must know the medical facts about AIDS; (2) the attorney must have examined her personal values about death and sexuality and be comfortable with them; (3) the attorney must recognize that the legal system has always been and remains unjust in its treatment of gay and bisexual persons; (4) the attorney must develop contacts with local AIDS support groups; (5) the attorney must develop contacts with national AIDS organizations, and (6) the attorney must be familiar with legal materials specifically dealing with AIDS issues.

1. *Become Familiar With AIDS Medicine*

The attorney must know the "medicine" of AIDS to represent an AIDS client adequately. She must know how the disease process works within the body, how the virus is transmitted (and how it is not), how the disease affects the body, and how the various tests work and under what conditions.

Why is this kind of information important to an attorney? First, the attorney must be comfortable with the disease. You cannot adequately represent a client if you are terrified of him. An attorney for a person with AIDS must understand and believe that AIDS is not transmitted through casual contact,¹⁶ that the attorney will not get AIDS from meeting with the client in the office, the client's home, or the hospital, and that a person with AIDS will not transmit the disease by shaking hands, or by sneezing or coughing in one's presence.¹⁷ The attorney must be absolutely sure of these facts, or she will transmit her fear to the client. Not only will such a transmission of feelings injure the attorney-client relationship, but it will also prevent the attorney from providing the necessary professional objectivity.

Second, the attorney must be able to explain the disease to others. A great deal of work for PWA's involves mediation, settlement, and running intervention. If the attorney is going to handle such tasks, she must be able to convince others of her knowledge and comfort level with AIDS. For example, in employment cases, many persons do not wish to sue but prefer that their attorney, working in concert with other

see AIDS—ACQUIRED IMMUNE DEFICIENCY SYNDROME, AND OTHER MANIFESTATIONS OF HIV INFECTION (G. Wormser ed. 1987) [hereinafter AIDS AND OTHER MANIFESTATIONS]; AIDS FROM THE BEGINNING (H. Cole ed. 1986).

16. In his report on AIDS, Surgeon General C. Everett Koop states: "AIDS is an infectious disease. It is contagious, but it cannot be spread in the same manner as a common cold or measles or chicken pox. . . . AIDS is *not* spread by common everyday contact but by sexual contact. . . ." U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1985) (emphasis in original) [hereinafter SURGEON GENERAL'S REPORT].

17. Several studies have been conducted to determine the risk of non-sexual household contacts with PWA's. Each study concluded that only a minimal to non-existent risk of transmission exists. See Fischl, Dickinson, Scott, Klimas, Fletcher & Parks, *Evaluation of Heterosexual Partners, Children and Household Contacts of Adults With AIDS*, 257 J. A.M.A. 640 (Feb. 6, 1987); Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients With AIDS or AIDS-Related Complex With Oral Candidiasis*, 314 NEW ENG. J. MED. 344 (1986); *Risk Small or Non-Existant for Family, Researcher Says*, 3 AIDS Pol'y & L. (BNA) No. 3, at 2 (Feb. 24, 1988). Considering the lack of seroconversion among the household members who shared razors, toothbrushes, and bathroom and kitchen facilities with an AIDS patient, an attorney representing a PWA has little to fear.

professionals, convince their employers that one can safely and profitably continue to employ a PWA or HIV seropositive person. To educate another, you must be educated and convinced.

Third, many legal issues dealing with AIDS require that medical evidence be introduced. For example, arguing that AIDS is a handicapping condition requires knowledge of the disease.¹⁸ Proving your client "otherwise qualified"¹⁹ also requires knowledge of the disease. Likewise, devising a "reasonable accommodation"²⁰ requires an understanding of how the disease affects or may affect your client. When deciding whether a particular public health regulation is "constitutional," courts rely almost exclusively on medical testimony.²¹ In insurance cases, the key issue is often whether a certain illness is a pre-existing condition for AIDS.²² The meaning of various tests, their reliability, and their accuracy are also crucial to insurance cases. Understanding how AIDS is and is not transmitted is of great importance in criminal cases with regard to what kind of harm the defendant intended;²³ obviously in tort cases, the issue is equally important.²⁴

2. *Examine Your Personal Values: Are You Comfortable With Them?*

The attorney who agrees to represent a person with AIDS or an HIV seropositive person must have examined and know her own value system. The Canons of Ethics require us to represent our clients zealously²⁵ and also encourage us to represent unpopular causes.²⁶ Perhaps in the case of AIDS, some attorneys cannot simultaneously follow both Canons.

18. See *infra* notes 162-86 and accompanying text.

19. See *infra* note 185 and accompanying text.

20. See *infra* note 186 and accompanying text.

21. *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479, 495-96 (1985).

22. See, e.g., *Franz v. Coastal Ins. Co.*, No. 880812 (San Francisco Super. Ct. filed Aug. 31, 1987); *Horner v. Great Republic*, No. 2522 (San Francisco Super. Ct. settled out of court Nov. 20, 1987); *Schatz, The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1786 (1987).

23. See, e.g., *United States v. Moore*, 669 F. Supp. 289 (D. Minn. 1987) (motions for judgment of acquittal and for a new trial denied to an HIV seropositive prisoner convicted of assaulting two officers by biting them); *Florida v. Sherouse*, No. CR87-7057 (Fla. Cir. Ct. Mar. 18, 1988) (court granted motion to dismiss attempted manslaughter charges against HIV seropositive prostitute who engaged in sexual intercourse and concluded no evidence of intent to kill existed); *Field & Sullivan, AIDS and the Criminal Law*, 15 LAW, MED. & HEALTH CARE 46 (1987).

24. See, e.g., *C.A.U. v. R.L.*, No. 86-11CV480825 (Minn. Dist. Ct. filed Nov. 5, 1986) (plaintiff claimed defendant fiancé negligent in failing to inform or warn of AIDS-related complex or past sexual activities); *Baruch, supra* note 7; *Hermann, Torts: Private Lawsuits About AIDS*, 87 AIDS REP. No. 5, at 1 (1988).

25. The Model Code of Professional Responsibility states:

The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

26. EC 2-27 states:

History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (1980).

Representing a PWA requires the attorney to face two issues not often faced: death and sexuality.

a. *Death*

Estate planning for persons in their sixties and seventies is expected and considered natural.²⁷ Estate planning for persons in their twenties and thirties is often unnerving for many attorneys. In my practice, I sit across the desk from or by the hospital beds of young men the ages of my sons and know their deaths are inevitable. Not only is the timing of their deaths out of proper sync, but their deaths are not easy. Most persons who die as a result of AIDS do not die of one opportunistic disease but of two or three.²⁸ Often the last days involve loss of memory and other manifestations of end-stage dementia.²⁹ If the attorney has not confronted her own mortality, AIDS may dramatically force the issue. If she cannot handle thoughts of her own death, the attorney may not be much help in assisting a client to handle his death.

b. *Sexuality*

AIDS is a blood borne disease, which has two primary methods of transmission: sexual contact and blood inoculation through intravenous drug use or blood transfusion.³⁰ Although the demographics of AIDS are changing, especially in the New York/New Jersey region,³¹ the main population group hit with AIDS in the United States is males who have had sex with other males, namely gay and bisexual men.³² While in other countries, the disease affects the heterosexually oriented with much greater frequency than the homosexually oriented,³³ in the United States the disease apparently got its start in the male homosexual community. Since gay people are a stigmatized group in the United States, the stigma of homosexuality is firmly attached to the disease. A large majority of AIDS clients are likely to be gay or bisexual men. In order to represent these persons zealously, the attorney must examine her own biases and values in this area. For many persons, the issue goes

27. The germinal work in this area is E. Kubler-Ross' *On Death and Dying* (1969). Kubler-Ross has now turned her attention to AIDS. See E. KUBLER-ROSS, *AIDS: THE ULTIMATE CHALLENGE* (1987).

28. See generally Welch, Finkbeiner, Alpers, Blumenfeld, Davis, Smucker & Beckstead, *Autopsy Findings in the Acquired Immune Deficiency Syndrome*, 252 J. A.M.A. 1152 (1984).

29. A distinction exists between AIDS-related dementia and AIDS dementia complex (ADC). The former is diagnosed when an intellectual impairment can be attributed to an ongoing dysfunction of the brain (*i.e.*, tumors, medication effects, or infection process). ADC, on the other hand, is believed to be caused by the virus itself. Cognitive, motor, and behavioral disturbances are characteristic of ADC. For an excellent discussion of these issues, see Seaman, *Dementia and HIV-Infection*, 2 TREATMENT ISSUES 1 (June 1, 1988) (newsletter published by the Gay Men's Health Crisis).

30. Ward, Hardy & Drotman, *AIDS in the United States*, in *AIDS AND OTHER MANIFESTATIONS*, *supra* note 15, at 18, 26.

31. "Fifty to 60 percent of New York City's 200,000 intravenous drug abusers are thought to be seropositive for HIV." Weinberg & Murray, *Coping With AIDS, the Special Problems of New York City*, 317 NEW ENG. J. MED. 1469, 1470 (1987). The higher number of AIDS deaths involving drug users means that homosexual men no longer are the major group at risk in New York City. The majority of AIDS cases in New York City and New Jersey now involve intravenous drug users. Sullivan, *New York Finds More Drug Addicts Than Homosexuals Killed by AIDS*, N.Y. Times, Oct. 22, 1987, at 13 (nat'l ed.).

32. According to statistics kept by the Centers for Disease Control, 39,990 of the 64,506 reported cases of AIDS are homosexual and bisexual males. CDC, *AIDS WEEKLY SURVEILLANCE REP.*, June 6, 1988.

33. The male to female ratio of cases in Central Africa is 1:1. Quinn, Mann, Curran & Piot, *AIDS in Africa: An Epidemiologic Paradigm*, 234 SCIENCE 955 (1986).

beyond values and challenges their own security about their own sexuality. Personal biases compounded by personal sexual insecurities may make some attorneys inappropriate advocates.

Dealing with bisexual men who are married may present even greater challenges for some attorneys.³⁴ Attorneys may experience conflict of interest problems about maintaining confidentiality from clients' wives or may impute a duty to warn³⁵ issue into the attorney-client relationship.

No matter who the attorney, in order to represent the client zealously, she must make sure that her own biases do not overcome her professional responsibilities. Gay and lesbian attorneys open and sympathetic to PWA's who are gay may similarly find themselves challenged when representing intravenous drug users. Non-gay people have no monopoly on prejudice and bias. One way to overcome biases is to educate oneself about the group one fears.

3. Recognize the Legal System's Unjust Treatment of Gay and Bisexual Persons

Attorneys who represent PWA's who are gay or bisexual must understand that gay persons were treated differently by the legal system before AIDS ever appeared.³⁶ The law was not designed for gay couples; the law actively discriminates in many areas against gay people. In twenty-four states, homosexual conduct is still criminal.³⁷ Representing gay people is different, and, in essence, a body of gay law

34. See THE BISEXUAL SPOUSE: DIFFERENT DIMENSIONS IN HUMAN SEXUALITY (I. Hill ed. 1987); A. KARLEN, THREESOMES: SEX, POWER, AND INTIMACY (1988).

35. Attorney C. Rick Chamberlin has addressed this issue in divorce cases.

If the other side knows there's a pending death, it's [sic] approach will differ. . . . So it would be beneficial to keep that information to yourself, if you felt you could ethically do so. With this disease, is there an ethical duty to inform the other lawyer, "My client may have infected your client and your client should be tested"?

AIDS and Divorce: A New Legal Arena, N.Y. Times, Sept. 21, 1987, at Y-23. The ABA Model Code of Professional Responsibility states that a lawyer may reveal confidences and secrets of a client when the client intends to commit a crime and the information is necessary to prevent the crime. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (amended Feb. 1980). The Model Rules of Professional Conduct are somewhat more specific. Rule 1.6(b)(2) provides: "a lawyer may reveal such information to the extent the lawyer believes necessary . . . to prevent . . . the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm. . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (Proposed Final Draft 1981).

36. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) [hereinafter Rivera I]; Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1981) [hereinafter Rivera II]; Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties—Part I*, 10 U. DAYTON L. REV. 459 (1985) [hereinafter Rivera III(1)]; Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties—Part II*, 11 U. DAYTON L. REV. 275 (1986) [hereinafter Rivera III(2)].

37. ALA. CODE § 13A-6-65(a)(3) (1982) (1-year maximum); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (Supp. 1985) (30 days); ARK. STAT. ANN. § 41-1813 (1977) (1-year maximum); D.C. CODE ANN. § 22-3502 (1981) (10-year maximum); FLA. STAT. § 800.02 (1985) (60-day maximum); GA. CODE ANN. § 16-6-2 (1984) (1 to 20 years); IDAHO CODE § 18-6605 (1979) (5-year minimum); KAN. STAT. ANN. § 21-3505 (Supp. 1985) (6-month maximum); KY. REV. STAT. § 510.100 (Michie/Bobbs-Merrill 1985) (90 days to 12 months); LA. REV. STAT. ANN. § 14:89 (West Supp. 1986) (5-year maximum); MD. ANN. CODE Art. 27, §§ 553-54 (1987) (10-year maximum); MICH. COMP. LAWS §§ 750.158, 750.388(a)-(b) (1968) (.158, 15-year maximum; .388, 5 year maximum); MINN. STAT. § 45-5-505 (1985) (10-year maximum); NEV. REV. STAT. § 201.190 (1985) (6-year maximum); N.C. GEN. STAT. § 14-177 (1981) (10-year maximum); OKLA. STAT. tit. 21, § 866 (1983) (10-year maximum); R.I. GEN. LAWS § 11-10-1 (1981) (7 to 20 years); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985) (5-year maximum); TENN. CODE ANN. § 39-2-612 (1982) (5 to 15 years); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974) (\$200 maximum fine); UTAH CODE ANN. § 76-5-403 (1983) (6-month maximum); VA. CODE ANN. § 18.2-361 (1988) (5-year maximum).

exists.³⁸ In many cases, especially custody issues, military matters, and estate planning, conscientious representation means mastering and using gay law on behalf of your clients. The most important general text to own and to use is *Sexual Orientation and the Law*.³⁹

4. Develop Contacts With Local AIDS Groups

Attorneys who represent PWA's or HIV seropositive persons must have contact with the major AIDS groups in their areas. The reasons are many. First, attorneys are generally ill-equipped to deal with psychological problems. Persons with AIDS and especially seropositive persons usually need support groups and counseling. The local AIDS group will either provide such help or know where it can be found. Second, many problems faced by a PWA are social problems, such as housing and accessing governmental assistance programs. This kind of work is the special province of social workers who are trained to handle these tasks.⁴⁰ Local AIDS organizations either provide social services or know how to access them. Third, PWA's, especially if they are gay, often have no family support system because they have been disowned by their biological families or, in some cases, by their lovers.⁴¹ Local AIDS organizations almost always have a "buddy" system⁴² that can provide the client with needed

38. See, e.g., K. BOURDONNAY, R. JOHNSON, J. SCHUMAN & B. WILSON, *FIGHTING BACK: LESBIAN AND GAY DRAFT, MILITARY AND VETERANS ISSUES* (1985); D. HITCHENS, *LESBIAN MOTHER LITIGATION MANUAL* (1982).

39. NATIONAL LAWYERS GUILD, *ANTI-SEXISM COMMITTEE OF SAN FRANCISCO BAY AREA CHAPTER, SEXUAL ORIENTATION AND THE LAW* (R. Achtenberg ed. 1987) [hereinafter *SEXUAL ORIENTATION AND THE LAW*]. Available for \$75 from Clark Boardman, Co., 435 Hudson St., New York, NY 10014.

40. Social workers as advocates is a relatively recent development.

Advocacy is a concept which social work has borrowed from the legal profession. As advocate, the social worker becomes the speaker for the client by presenting and arguing the client's cause when this is necessary to accomplish the objectives of the contract. As Charles Grosser notes, the advocate in social work is not neutral but, like the advocate in law, is a partisan representative for the client. . . . The advocate will argue, debate, bargain, negotiate, and manipulate the environment on behalf of the client. . . . Advocacy differs from mediation; in mediation the effort is to secure resolution to a dispute through give and take on both sides. In advocacy the effort is to win for the client; advocacy efforts are frequently directed towards securing benefits to which the client is legally entitled. Advocacy, like the other roles, can be used with client systems of various sizes.

B. COMPTON & B. GALAWAY, *SOCIAL WORK PROCESSES* 342-43 (1979). "Connecting clients with community resources is a well-recognized social work task." *DIFFERENTIAL DIAGNOSIS AND TREATMENT IN SOCIAL WORK* 387 (F. Turner 3d ed. 1983).

41. See Nichols, *Psychotherapy and AIDS*, in *CONTEMPORARY PERSPECTIVES ON PSYCHOTHERAPY WITH LESBIANS AND GAY MEN* (T. Stein & C. Cohan ed. 1986).

Problems with families occur throughout the course of their illness. Patients may attempt to hide the nature of their illness from their families, but eventually many patients express the need for familial support. They may find this support almost impossible to ask for because they fear rejection and the emotional drain of coming out. Under normal circumstances, Saghir and Robins (1973) found that 48 percent of parents responded to the disclosure of homosexuality by a child with anger, condemnation, shame, disbelief, or alienation, or by ignoring the individual. Rejection of a fatally ill person, however, may cause guilt and family members may appear to accept the individual, but their relationship to him is characterized by ambivalence and unexpressed hostility.

Id. at 217. The AIDS epidemic has made support groups for parents of gay and lesbian children more essential than ever. Two such groups are Federation of Parents and Friends of Lesbians and Gays (P-FLAG), P.O. Box 24565, Los Angeles, CA 90024, and National Federation of Parents and Friends of Gays (NF-PFOG), 8020 Eastern Avenue N.W., Washington, D.C. 20012, (202) 726-3223.

42. With the advent of AIDS, the term "buddy" has taken on a new meaning. PWA's are matched with volunteers who are willing to provide support and friendship and to help with daily activities such as shopping, transportation, cooking, and cleaning. Buddies also provide support if the PWA is hospitalized and/or in the terminal stages of the disease. See Williams, *Remembering Phillip: A 'Buddy's' Story*, *Good Times*, July 15, 1986, at 20, col. 1.

human support, which again is not the appropriate role for the attorney. This statement does not suggest that an attorney can never provide needed human support for a PWA; however, the roles are separate and need not overlap. To do an effective job of legal representation, an attorney must keep an eye on the line between good representation and inappropriate and detrimental intrusion into the client's life (and vice versa). Fourth, re-inventing the wheel is never helpful. Local AIDS organizations know the problems faced by other PWA's and how those problems were solved (or at least resolved).⁴³ Contact with these organizations provides the attorney with easily accessed information that can save her hours of investigation and research.

5. Develop Contacts With National AIDS Organizations

Attorneys who represent PWA's should be aware of national organizations that have represented PWA's and that will often provide information and assistance.⁴⁴

6. Know What Legal Materials on AIDS are Available

Finally, attorneys who are going to represent PWA's need to become familiar with basic legal materials which keep track of the burgeoning AIDS law field. Two excellent sources are: *AIDS Policy and Law*, published by the Bureau of National Affairs, and *AIDS Litigation Reporter*, published by Andrews Publications, Inc.⁴⁵

II. SPECIFIC AIDS ISSUES FOR CONSIDERATION

A. Estate Planning

1. Wills

One of the most common tasks that attorneys perform for HIV seropositive persons or for PWA's is the drafting of wills. Certainly, all routine techniques for will drafting are appropriate; however, three special considerations exist: "Undue influence," "dementia," and confidentiality/conflict of interest.

43. For example, the Texas Human Rights Foundation and the Houston Chapter of the American Civil Liberties Union sponsored the creation of a Texas AIDS legal handbook (T. COLEMAN, *THE TEXAS AIDS LEGAL HANDBOOK* (1988)) available from the AIDS Legal Hotline, 1236 West Gray, Houston, Texas 77019. See also AIDS ACTION COUNCIL, *AIDS EDUCATION AND SERVICE PROVIDING ORGANIZATIONS* (1987) (available from the National AIDS Network, 1012 14th N.W., Suite 601, Washington, D.C. 20005, (202) 347-0390).

44. E.g., Lambda Legal Defense and Education Fund, Inc., 666 Broadway, New York, NY 10012, (212) 995-8585; National Gay Rights Advocates, 540 Castro St., San Francisco, CA 94114, (415) 863-3634; AIDS Network, National Lawyers Guild, 211 Gough Street, Third Floor, San Francisco, CA 94102, (415) 861-8884; American Civil Liberties Union, 132 West 43rd Street, New York, NY 10036, (212) 944-9800; National Gay and Lesbian Task Force, 1517 U Street N.W., Washington, D.C. 20009, (202) 332-6483. Some helpful resources include: NATIONAL GAY RIGHTS ADVOCATES & NATIONAL LAWYERS GUILD, *AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE* (2d ed. 1988) [hereinafter *AIDS PRACTICE MANUAL*]; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *AIDS LEGAL GUIDE* (2d ed. 1987) [hereinafter *AIDS LEGAL GUIDE*].

45. *AIDS Policy & Law* is a biweekly newsletter available from the Bureau of National Affairs, 1231 25th Street N.W., Washington, D.C. 20037 at a cost of \$287/year. *AIDS Litigation Reporter* is published by Andrews Publications, Inc., Edgemont, PA 19028 at a cost of \$300/year. Other helpful sources are *AIDS Update*, a newsletter from Lambda Legal Defense & Education Fund, Inc., 666 Broadway, New York, NY 10012, and *AIDS Record* by Bio-Data Publishers.

a. *Disarming the Undue Influence Attack*

Long before AIDS, knowledgeable attorneys drawing wills for gay folks knew special problems existed.⁴⁶ Wills of gay men and lesbians were attacked on the grounds of "undue influence."⁴⁷ Biological family members sought to set aside wills that left property, usually the residue of the estate, to the testator's life partner.⁴⁸ Courts considered heterosexual spouses to be "the natural objects of a decedent's beneficence," but regarded gay lovers as illegitimate beneficiaries whose undue influence over the testator unnaturally pressured the testator into an improper decision.⁴⁹ Consequently, such wills have been set aside by the courts based solely on the effect that the homosexuality of the testator supposedly had on the will.⁵⁰ While appellate cases illustrating this phenomenon are rare, anecdotal evidence of many attorneys indicates that it is not uncommon. Usually the attack on the will by the biological family ends with a settlement under which the testator's chosen beneficiary is substantially dispossessed. These cases are not usually appealed. These same influences are at work in the wills of PWA's. A recent article in the *New York Times*⁵¹ reported that AIDS has produced an unusual number of will contests in New York with regard to the estates of gay men.

What can an attorney do to circumvent the biological family's attack on the will in order to protect the wishes of the testator? First, the attorney must be aware of the likelihood of such an event and not dismiss the fears of the testator as paranoia. Second, the more precise answers are state idiosyncratic.⁵² The attorney must research and use every means under her state law to protect the integrity of the will. To illustrate, Ohio law provides that a testator may "prove" his or her will before death.⁵³ Also, Ohio wills may be videotaped.⁵⁴ Furthermore, a special action in Ohio allows adults to "designate an heir."⁵⁵ By this rather simple procedure, one can designate another person as his "heir," and, under Ohio law for purposes of inheritance, this person stands as a "child" to the person making the designation. So the attorney must know the law of her state. Third, attorneys representing gay clients for will drafting generally agree on a number of other strategies, which are national in scope.⁵⁶ For example, attorneys often suggest to gay testators that they leave items of personal property, preferably items with family significance, to blood relatives in

46. See Rivera, *Legal Planning for Loving Partnerships*, in *OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK* (G. Vida ed. 1978).

47. See Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

48. Estate of Thaler, N.Y.L.J., Oct. 3, 1985, at 7, col. 1 (N.Y. Sur. Ct.).

49. "[C]ourts often assert that a wife is allowed greater freedom than others in urging the testator to make a will in accordance with her wishes—that conduct which would amount to undue influence in the case of someone other than a spouse is permissible in the case of a spouse." Sherman, *supra* note 47, at 230.

50. *In re Kaufmann's Will*, 20 A.D.2d 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y.2d 825, 257 N.Y.S.2d 941, 205 N.E.2d 864 (1965). For a thorough discussion of this case, see Sherman, *supra* note 47, at 239–46. See also Rivera III(2), *supra* note 36, at 380–83.

51. Johnson, *Challenges Rise Sharply on AIDS Victims' Wills*, N.Y. Times, Feb. 19, 1987, at 16, col. 1 (nat'l ed.).

52. See, e.g., TEXAS AIDS LEGAL HANDBOOK, *supra* note 43, at 20, Attachment 7.

53. OHIO REV. CODE ANN. § 2107.081 (Anderson 1972).

54. OHIO REV. CODE ANN. § 2101.121 (Anderson 1976 & Supp. 1987).

55. OHIO REV. CODE ANN. § 2105.15 (Anderson 1976 & Supp. 1987).

56. Mock & Tobin, *Estate Planning for Clients with AIDS*, 7 ST. LOUIS U. PUB. L. REV. 177 (1988).

order to convince the court that the testator considered his biological family. Many attorneys suggest specific disinheritance clauses and no contest (*in terrorem*) clauses.

I recommend to my clients that they choose a neutral person as executor of their will rather than their life partner. I have found that popular belief sees the executor as someone who can magically hide assets and do fraudulent things. Biological families often see the life partner in the role of executor as able to commit fraud. A neutral executor puts a buffer between the life partner, who is usually the residuary legatee, and the biological "heirs." Of course, special attention should be paid to the choice of witnesses and to the rituals of execution.

All of these caveats apply to testators in general, but even more so to PWA and HIV seropositive testators. Biological families appear to be torn between guilt and anger when they discover that their relative is not only gay, but also has AIDS.⁵⁷ Often the anger is directed at the life partner who is blamed not only for "leading their child astray," but also for infecting their child with AIDS. This anger may be played out in the probate court.

The reason that wills are of such importance to gay men in these circumstances is that gay persons cannot marry,⁵⁸ and the laws of intestacy give no recognition to a gay relationship. Rather, the law apportions inheritance either on the basis of marriage or blood.⁵⁹ If a gay person does not make a will, the life partner has no legal claim to the assets of the estate.

Last, but hardly least, the attorney must use creative lawyering with regard to the tax consequences of the will. State inheritance and estate taxes provide various deductions based on marriage⁶⁰ and blood relationship. In many states, tax rates vary with the relationship of the testator to the beneficiary. None of these tax savings are available to the gay life partner. Lawyers should give special thought to advising their clients about joint tenancy with the right of survivorship, which avoids probate and, in some limited cases, tax consequences.⁶¹ The lawyer should also make sure that her client utilizes beneficiary designations on life insurance, retirement funds, and other similar assets. Passing property by the designation of a beneficiary avoids probate and often avoids adverse tax consequences.⁶² She should likewise consider inter vivos trusts where appropriate.

b. *Deciding Estate Disposition Before Dementia Becomes an Issue*

One of the main issues facing lawyers writing wills for HIV infected individuals regardless of their disease stage, asymptomatic or frank AIDS, is the "dementia"

57. See generally C. PEARSON, GOOD-BYE, I LOVE YOU (1986) (the ex-wife of a PWA tells her story); B. PEABODY, THE SCREAMING ROOM (1986) (the mother of a PWA tells her story).

58. Rivera I, *supra* note 36, at 874-78.

59. See, e.g., OHIO REV. CODE ANN. § 2105.06 (Anderson 1976 & Supp. 1987).

60. See Lovas, *When Is A Family Not A Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 382-83 (1987-88).

61. Hughes, *Determining the Advantages and Disadvantages of Joint Ownership*, 32 PRACTICAL LAW. 39 (1986).

62. G. COUCH, 4 CYCLOPEDIA OF INSURANCE LAW §§ 27:183 & :202 (M. Rhodes rev. ed. 1984); Lovas, *supra* note 60, at 354.

issue.⁶³ HIV is a retrovirus which can pass through the blood-brain barrier.⁶⁴ The virus can cause central nervous system damage.⁶⁵ Dementia in various levels is seen in persons with HIV infection or AIDS.⁶⁶

The lawyer must first understand dementia. Contrary to popular thought, a person with dementia is not a demented person running amok with an ax in his hand—a “crazy”! Rather, the most common manifestation of dementia in a PWA is short-term memory loss and times of confusion.⁶⁷ In some persons at end-stage AIDS, the dementia can be severe, and the person is unable to recognize his loved ones or unable to cope with decisions.⁶⁸ However, the issues of dementia have been greatly exaggerated in the popular press.⁶⁹ The military has added to this hysteria by promulgating a policy that HIV infected persons are security risks or unsafe to handle security operations.⁷⁰ Medical scientists recently published a study saying that dementia is no more common in asymptomatic HIV infected persons than in the general population.⁷¹ Moreover, a study of the literature reveals that the ability to choose disposition of property is seldom affected until the end-stage disease and then only in a small number of patients.⁷² However, all the medical information in the world does not discourage popular images nor necessarily discourage attacks on a will by persons who claim that dementia incapacitated the testator. For this reason, attorneys must urge their clients to handle their testamentary dispositions and other estate matters as soon as possible after knowledge of a positive test or an AIDS diagnosis. This legal need may not fit neatly into the emotional needs of the client who has just learned that he has a potentially fatal infection or AIDS. The attorney must delicately help the client deal with these issues as early as possible.

Similarly, the attorney will want to take special care that when the client signs any document everything is done to prove his competency at that time. In some cases, this special effort will include obtaining an official evaluation from a doctor. My

63. See, e.g., *AIDS Dementia Presents Dilemma in Will Contests*, 1 MANHATTAN LAW. No. 16, at 1 (Jan. 12-18, 1988); *Friends, Relatives Challenging Wills of AIDS Victims*, Am. Med. News, Mar. 13, 1987, at 36. For a definition of dementia, see, *supra* note 29.

64. The virus has been detected in neural tissues and cerebrospinal fluid. Gabuzda, Kaplan & Ho, *HIV Infections of the Nervous System*, in AIDS AND OTHER MANIFESTATIONS, *supra* note 15, at 623.

65. Price, Brew, Sidtis, Scheck, Rosenblum & Cleary, *The Brain in AIDS: Central Nervous System HIV-1 Infection and AIDS Dementia Complex*, 239 SCIENCE 586, 587-88 (Feb. 5, 1988) [hereinafter Price, Brew].

66. *Id.* at 586.

67. *Id.* at 586-87. See Seaman, *supra* note 29, at 1.

68. Price, Brew, *supra* note 65, at 587.

69. See *Recent Reports of 'Cognitive Loss' Overstated, Premature*, Washington Blade, Jan. 15, 1988, at 3. The term “AIDS Dementia Complex” has been used in different contexts and has caused confusion. The vagueness in criteria and the willingness of some investigators to accept unestablished evidence in diagnosing ADC also add to the exaggeration. Seaman, *supra* note 29, at 1-2.

70. See *Pentagon Revises AIDS Policy*, 1 Empl. Testing: Biweekly Rep. (University Publication) 31 (May 15, 1987); *Revised AIDS Policy Okayed; Some Sanctions Authorized*, 2 AIDS Pol’y & L. (BNA) No. 8, at 5 (May 6, 1987).

71. At the Fourth International AIDS Conference in Stockholm, Dr. Ola Selnes of the Johns Hopkins Medical Institute presented his findings which showed no statistical difference between HIV seropositive persons and the non-infected control group. Seven other researchers confirmed that persons in the early stages of infection do not suffer significant neuropsychological impairments. Keen, *Early Mental Problems Disproved*, Washington Blade, June 24, 1988, at 11.

72. See also Price, Brew, *supra* note 65, at 587; *Recent Reports of 'Cognitive Loss' Overstated, Premature*, Washington Blade, Jan. 15, 1988, at 3 (initial “subtle cognitive changes” may be caused by the depression or stress from learning that one has tested HIV seropositive).

current policy, when I take a document to be signed in a hospital, is to take a nurse-social worker with me who does a mental competency test on the client and then becomes one of the witnesses. The choice of witnesses is crucial in such situations.

c. Maintaining Confidentiality and Avoiding Conflicts of Interest in the Attorney-Client Relationship

For an attorney who has not often dealt with gay clients, the issues of privilege and confidentiality will not have arisen in this particular context. When any individual client consults an attorney, his conversation is privileged; that is, the attorney may not reveal that consultation and the information given by the client without the client's permission.⁷³ If a third party is present when the attorney and client talk, the consultation ceases to be privileged.⁷⁴ A married couple (i.e., male and female) has a privilege between them.⁷⁵ Therefore, when a married couple visits an attorney, their consultation, as a couple, is privileged. However, if a gay couple visits an attorney for a similar reason, since the partners have no legal status towards one another and cannot marry, they have no joint privilege. Therefore, if the attorney talks with them as a couple, one member of the couple is, in effect, a stranger to the conversation between the attorney and his life partner, and the privilege is broken.⁷⁶ (In my own practice, I have taken the position that I will treat a gay couple's joint consultation as privileged, and I am willing to face jail for that position. Others may not be so foolhardy and may wish to explain the situation to the clients and have them choose their approach.)

A similar issue arises with conflict of interest questions. Advising gay couples raises more problems with potential conflict of interest than does advising heterosexual married couples. At a minimum, the attorney must disclose the potential conflict⁷⁷ and give the clients the choice of continuing with her or seeking other representation for one of the members. Clearly if the attorney continues with the couple and they break up, the attorney must not represent one against the other.

2. Medical Power of Attorney

Of more crucial interest is the relationship between gay life partners while they are both alive. Many persons with ARC (AIDS-related complex) or AIDS have no biological family upon whom they can either rely or in whom they can trust. Thus, in times of emergency, these persons rely upon either their life partner, a friend, or a "buddy" from the local task force. However, none of these individuals has a legal relationship to the PWA; hence, when the PWA enters any institution, be it a

73. L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* 5-18 (1982). Many states have statutory provisions that excuse an attorney from testifying in regard to communications made by the client. *See, e.g.*, OHIO REV. CODE ANN. § 2317.02 (Anderson 1981 & Supp. 1987).

74. *See* E. CLEARY, *McCORMICK ON EVIDENCE* § 91 (3d lawyer's ed. 1984).

75. *See generally id.* at §§ 78-86.

76. *See id.* at § 91.

77. *SEXUAL ORIENTATION AND THE LAW*, *supra* note 39, at § 2.03.

hospital, a prison, or any other such facility, the person upon whom the PWA relies and in whom he trusts has no legal standing. Lawyers representing gay folks have worked on this issue for years by using medical powers of attorney.⁷⁸

Recently, the publicity surrounding the Thompson-Kowalski⁷⁹ case has caused public awareness of the problem. In 1983, Sharon Kowalski and her life partner, Karen Thompson, were leading rather typical closeted lesbian lives. Neither woman had come out to her parents. Thompson was a teacher and feared for her job if her sexual orientation became known. The two women owned a house jointly and had lived together in a committed relationship for over nine years when tragedy struck. On her way home from work, Sharon Kowalski was severely injured in an automobile accident. At the hospital, her life partner was not recognized as a legitimate person for notification, information, or visitation rights. When Kowalski's parents arrived, they intensified the exclusion of Thompson from Kowalski's life, a practice which continues to this day. The parents denied that their daughter was a lesbian, and they indicated that if Thompson were allowed to see Kowalski she would sexually molest her. The father eventually became the court-appointed guardian and has permanently and brutally enforced the separation. The story is much more complex than this short synopsis can show.⁸⁰ However, the message is clear to gay and lesbian life partners and to friends and "buddies" of PWA's: You need some legal status to continue to care for your loved one.

In essence, a medical power of attorney allows the PWA to appoint another person to stand in relation to them for medical purposes as "next of kin."⁸¹ The designated person becomes the attorney-in-fact for the PWA and has the power to act on the PWA's behalf under circumstances set forth in the medical power. The power should define the rights of "next of kin" to include visitation privileges in the hospital, the right to be informed of and consulted about the patient's condition, and the right to sign medical permission when necessary (this section should also release doctors from liability for accepting the attorney-in-fact's signature). If state law permits, the power should be "durable," that is, be effective after the giver of the power becomes incompetent.⁸² Most lawyers recommend that the power be for a

78. See H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 205-19 (1985); AIDS LEGAL GUIDE, *supra* note 44, at §§ 1-3; AIDS PRACTICE MANUAL, *supra* note 44, at § III-5; SEXUAL ORIENTATION AND THE LAW, *supra* note 39, at § 4.07; Rivera III(2), *supra* note 36, at 390.

79. *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. App.), *cert. denied*, 475 U.S. 1085, *subsequent appeal on different issues*, 392 N.W.2d 310 (1986).

80. Karen Thompson has taken her battle to care for her lover Sharon to the national media. Grassroot support and fundraising groups have sprung up across the U.S. For further information, contact Karen Thompson Legal Fund, c/o Julie Andrzejewski, 32495 County Road #1, St. Cloud, MN 56301.

81. Black's Law Dictionary defines next of kin:

The term "next of kin" is used with two meanings; (1) nearest blood relations according to law of consanguinity and (2) those entitled to take under statutory distribution of intestate's estates, and term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage, and may well embrace persons, who in natural sense of word, and in contemplation of Roman law, bear no relationship of kinship at all. . . .

BLACK'S LAW DICTIONARY 941 (5th ed. 1979) (citation omitted).

82. Under the common law, a power ceased to be effective if the principal became incompetent. Thus, just when the power was needed for medical emergencies, the power became ineffective. Most states now recognize some form of a durable power of attorney. *E.g.*, OHIO REV. CODE ANN. § 1337.09(A) (Anderson 1979 & Supp. 1987). If your state does not authorize a durable power of attorney, see SEXUAL ORIENTATION AND THE LAW, *supra* note 39, at § 4.07[3].

specific time duration for at least two reasons: (1) relationships change and (2) courts and other institutions are more likely to regard the power as truly expressing the power giver's current wishes if the granting of the power is relatively "fresh."

Again, I urge lawyers in these situations to check their state law. In Ohio, one can appoint a guardian in advance of incompetency.⁸³ Therefore, the common practice is to include such an appointment with the medical power of attorney. While one can hardly predict, one can say that much of what happened between Karen Thompson and the family of Sharon Kowalski could have been forestalled if provisions had been made for medical powers.

3. Living Wills

Another primary issue confronted by PWA's and their lawyers is the question of extraordinary life preserving actions and treatments.⁸⁴ Fighting multiple opportunistic infections can be a cruel and harrowing way to die. Choosing how to die is an issue.⁸⁵ The PWA movement stresses the empowerment of PWA's rather than their treatment as victims. Helping a PWA choose how to die may empower him to keep maximum control in a situation that affords only limited opportunities for such control.

One method for making such a decision and making it stick is the use of a Living Will.⁸⁶ Thirty-eight states and the District of Columbia now have statutes permitting a person to direct his medical caretakers as to what types of life-prolonging actions and treatments he wants.⁸⁷ In those states that have binding legislatively-created Living Wills, the testator can control the behavior of his medical caretakers.⁸⁸ As an attorney, your job is to see that the document is executed properly in accordance with the statute. Copies of the document should be placed in the PWA's records with his

83. OHIO REV. CODE ANN. § 2111.121 (Anderson 1976 & Supp. 1987).

84. Three related concepts regarding treatment decisions for terminally ill patients are: (1) "No-code" or "DNR" (do not resuscitate) orders, (2) withdrawal of life support, and (3) supportive care.

"No-code" or "DNR" orders refer only to the decision not to resuscitate a patient following cardiac, pulmonary, or cardiopulmonary arrest arising from underlying pathological processes. "No-code" should be carefully distinguished from the idea of withdrawing life support (i.e., respirator, intravenous fluids) from a patient who is unable to survive without them. . . .

Hirsch, *Treatment Decisions for Terminal Patients*, 33 MED. TRIAL TECH. Q. 140, 146 (1987). "[S]upportive care means the concept of providing care, management and medical therapy merely to preserve comfort, hygiene and dignity, but not to prolong life. The 'no treatment' concept must be clearly distinguished from supporting care." *Id.* at 144.

85. According to Hirsch, "[b]oth the courts and health care providers sometimes confuse the issue of DNR orders by indiscriminately using two types of indication or reasons for such orders: *medical prognosis* and *quality of life*. They raise very different issues." Hirsch, *supra* note 84, at 150. For example:

CPR may be contraindicated because it will do no good, that is, the patient will die soon anyway, and nothing can be done to stop the course of the disease. When the patient's condition is hopeless, no medical intervention is required. While there is room for debate about the normative aspects of such a prognosis, it is reasonable to conclude that there are cases where such a decision is basically medical and can (and should) be made by the attending physician

Id. "The second major reason for DNR orders is the belief that a patient's quality of life is so poor that preventing death by CPR is not justified. When DNR decisions are based on quality of life, only the patient's own view should be relevant." *Id.* at 151.

86. "A Living Will is an instrument that indicates the signer's desire that no extraordinary life sustaining measures be taken in the event of terminal illness with little or no hope of recovery." AIDS LEGAL GUIDE, *supra* note 44, at § 9-4.

87. Johnson, *Sequential Domination, Autonomy and Living Wills*, 9 W. NEW ENG. L. REV. 113, 114-15 n.3 (1987).

88. E.g., CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1988).

primary physician and in his hospital records upon hospitalization, especially in the floor records. However, more needs to be done beyond the mere execution of the document and its proper placement.⁸⁹ My experience is that doctors, trained to save lives, are very uncomfortable talking about death.⁹⁰ This phenomenon seems to be exaggerated in the cases of PWA's, perhaps because the patients are often the age of the doctor or younger. Early on, a PWA needs to have a frank discussion with his doctor in the presence of his attorney-in-fact (the person named on the medical power who will be responsible for medical decisions). The PWA needs to ask the doctor what is the worst case scenario (for example, intubation? ventilator?). Then the PWA must frankly tell the doctor what he wants. In particular, does he want to be coded, to have CPR administered, to have cardioversion, to be intubated? Does he want a ventilator, a nasal gastric tube for feeding, intravenous feeding, blood transfusions, or stomach tube feeding? A lawyer's job is to see that her client's wishes are followed. Facing these issues is not easy for the patient or the lawyer.

Patients might also want to talk about when they want to be left alone to exist with only comfort measures and pain killers. Many dying persons want no more procedures or tests, be they blood drawing or x-rays; documenting decline is pointless to many of them. Once a patient has made his wishes explicit to the doctor, the patient must firmly ask the doctor to put those wishes in the records and, if in the hospital, in the floor records. Putting a Living Will in the floor records without a clear and specific order from the doctor is often pointless. Medical personnel will take all life-preserving actions to prevent liability unless the doctor has expressly ordered the contrary.⁹¹

In some states, Living Wills are not binding.⁹² However, the actions the lawyer should suggest to her client are precisely the same. When life-saving issues become relevant, many doctors will often be guided by the patient's previously expressed wishes. A patient can directly ask the doctor her philosophy and choose a doctor whose philosophy corresponds to the patient's philosophy. If the patient is unable to give guidance concerning his wishes, the doctor will consult the biological family, the person holding the medical power, or the guardian. Under the law of guardianship, a guardian who advises a doctor on what medical actions to take for the patient is not supposed to use her own judgment, but apply what she believes to be the judgment of the patient.⁹³ This technique is called the use of "substituted judgment."⁹⁴ The person consulted can only guess if such issues have never been discussed or written down. If the PWA has expressed his wishes orally and caused

89. "The traditional reluctance of patients and physicians to interact on an honest and reflective basis cannot be cured with the stroke of a pen." Johnson, *supra* note 87, at 133.

90. J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 19, 213-29 (1984). See also *Doctor Urges Openness with AIDS Patients*, CDC, *AIDS WEEKLY SURVEILLANCE REP.*, June 27, 1988, at 10; C. Garfield, *Elements of Psychosocial Oncology: Doctor-Patient Relationship in Terminal Illness*, in *PSYCHOSOCIAL CARE OF THE DYING PATIENT* (C. Garfield ed. 1978).

91. See *Evans v. Bellevue Hospital*, N.Y.L.J., July 28, 1987, at 11, col. 1 (N.Y. Sup. Ct.).

92. *Guide to the Living Will*, *HIPPOCRATES*, May/June 1988, at 60.

93. Annotation, *Judicial Power to Order Discontinuance of Life-Sustaining Treatment*, 48 A.L.R.4th 67, 98-106 (1986).

94. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 751-53, 370 N.E.2d 417, 431 (1977).

them to be written down in various places, his wishes are much more likely to be carried out, even in states where Living Wills are not binding.

4. Suicide

One issue which the client may wish to discuss with the lawyer is his decision to commit suicide. Recent studies indicate that the suicide rate for persons with AIDS is significant.⁹⁵ This area is another where the value system of the individual attorney may be considerably challenged. Clients aware of the privilege of confidentiality may see the lawyer as one of the few persons with whom both a safe and an objective discussion can be held. Obviously, the lawyer does not want to open herself to the charge of being an accessory, and some question may arise as to the canonical duty to report a future crime.⁹⁶ Within the confines of state law and the Canons of Ethics, a lawyer can be helpful in a number of ways. First, you can advise your client on any crimes encompassed by or related to suicide. In particular, the client will want to understand the concept of accessory and its penalties,⁹⁷ so that he may do no harm to another. Second, I strongly urge the client to consult a therapist with the expertise to diagnose depression and the legal right to prescribe antidepressants.⁹⁸ I make clear to my client that my suggestion of counseling is not made to convince him to avoid suicide; rather, I point out that he should make sure that the mood which has led to this decision is not a response to a biochemical condition.⁹⁹ Basically, I urge that any

95. Marzuk, Tierney, Tardiff, Hsu, Mann, Gross & Morgan, *Increased Risk of Suicide in Persons with AIDS*, 259 J. A.M.A. 1333 (1988). But see *The Risk of Suicide in Persons With AIDS*, 260 J. A.M.A. 29 (1988) (letters criticizing research technique of Marzuk study).

96. The ABA Model Code and Model Rules state that a lawyer *may* reveal confidences of the client to prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1987). In adopting the Code or the Rules, some states have substituted the precatory "may reveal" to a mandatory "shall reveal." A duty to report would only arise in the mandatory jurisdictions. Two further problems arise in applying the Model Code and Rules to the client suicide situation. First, do they include injury to the client himself or are they limited to injury to third persons? Second, if suicide is not a criminal act in a jurisdiction, can Rule 1.6(b)(1) or DR 4-101(c)(3) be applied at all?

One court has concluded that the ethical duty of confidentiality does not prohibit the disclosure of a client's intent to commit suicide. In *People v. Fentress*, 103 Misc. 2d 179, 425 N.Y.S.2d 485 (1980), Judge Rosenblatt reasoned that "[i]f the ethical duty exists primarily to protect the client's interests, what interest can there be superior to the client's life itself?" *Id.* at 197, 425 N.Y.S.2d at 497. However, this case involved a distraught man who had committed murder prior to his conversation with the attorney. In the situation of a PWA contemplating suicide, the ethical justifications for breaching the client's confidence are not persuasive to me.

Another ethical wrinkle exists for attorneys who practice in states where suicide is still a criminal act. Ethical Consideration 7-5 of the Model Code prohibits a lawyer from encouraging or aiding her client to commit criminal acts or providing counsel on how to violate the law.

97. "More recently, . . . almost all states have decriminalized the acts of suicide and attempted suicide, although a majority of states still prohibit assisting or causing a suicide." Bloch, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 933 (1987) (footnotes omitted). A good starting point for an attorney checking the status of the law in her jurisdiction is the state by state survey of the law on criminality of suicide, attempted suicide, and aiding or assisting suicide in Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 148-242 (1985).

98. "In the late 1950's, two classes of drugs were discovered that proved effective in the treatment of depression—the imipramine-type drugs (tricyclic antidepressants) and the monoamine oxidase (MAO) inhibitors." H. KAPLAN & B. SADOCK, *MODERN SYNOPSIS OF PSYCHIATRY/III* 789 (3d ed. 1981). "These drugs remain the main form of pharmacotherapy with demonstrated efficacy for depressions." *Id.* at 375. See also THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 2338-40 (1982).

99. The American Psychiatric Association defines Organic Mood Syndrome as follows: "The essential feature of this syndrome is a prominent and persistent depressed, elevated, or expansive mood, resembling either a Manic Episode

decision of this nature be arrived at through reasoned thought. This position means that I believe suicide can be a rational act. If the lawyer cannot sustain this position, she needs to clearly indicate that to her client. Last, if the lawyer's values permit, the client can be given the address of the Hemlock Society.¹⁰⁰ The Hemlock Society publishes a book which describes methods of suicide with the purpose of preventing persons who are terminally ill from attempting suicide, failing, and ending up in a worse physical situation. Regardless of the lawyer's personal value system on this issue, any lawyer representing PWA's needs to be ready for such questions.

5. Funeral Arrangements

Lawyers are often asked to include funeral arrangements in wills. Many persons have definite wishes on their mode of burial. For PWA's estranged from the birth family, these wishes often run directly counter to the birth family's belief system. Life partners and friends are often left in the unenviable position of trying to abide by the PWA's last wishes in the face of a hostile family. Putting arrangements in a will is often futile; whatever may be done is often carried out long before a will is probated. This fact does not mean that directions cannot be stated in the will; however, the testator should understand that they may have no effect. The real issue comes down to "who owns the body upon death"?

Again, state law must be consulted. However, the state statutes and case law most likely will leave the issue unresolved.¹⁰¹ In most cases, choosing the path of least resistance and harkening to the siren call of tradition, hospitals and funeral homes follow the wishes of the biological family, even in clear defiance of the previously expressed wishes of the deceased. The major disputes usually revolve around cremation versus burial (some families are unalterably opposed to cremation on religious grounds), a religious versus nonreligious memorial (many PWA's are estranged from religion or opposed adamantly to the religion of their biological family), and disclosure versus nondisclosure of the sexual orientation of the deceased or the disease of death in obituaries or eulogies. Often biological families will try to exclude the deceased's life partner and gay friends from the services.

Persons who are dying usually strive to control some facet of their lives and to obtain some measure of dignity. To many PWA's, their last rites are tremendously important. To the survivors, adhering to these wishes becomes a matter of honor as well as a way to express grief and closure. For the lawyer to have to tell the PWA and

or a Major Depressive Episode, that is due to a specific organic factor. . . . This syndrome is usually caused by toxic or metabolic factors. . . ." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 112 (1987).

Compare: The essential feature of a Major Depressive Episode is either depressed mood . . . or loss of interest or pleasure in all, or almost all, activities, and associated symptoms, for a period of at least two weeks. The associated symptoms include appetite disturbance, change in weight, sleep disturbance . . . or suicidal ideation or attempts. . . .
Id. at 218-19. "Chronic physical illness . . . apparently predispose[s] to the development of a Major Depressive Episode." *Id.* at 221.

100. The National Hemlock Society, P.O. Box 66218, Los Angeles, CA 90066, (213) 390-0470.

101. See Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death*, 54 A.L.R.3d 1037 (1974).

his loved ones that control over the body and the rites cannot be guaranteed is particularly difficult, no matter how honest. To use an Ohio illustration, no Ohio statute on point exists.¹⁰² The case law is sparse, old, and diffuse.¹⁰³ In essence, the case law indicates that the wishes of the decedent are important but can be overridden by family decisions "where appropriate."¹⁰⁴ The family referred to is biological or marital. Ohio law is similar to the law of many other states.¹⁰⁵

What can the lawyer do to help the PWA make his decision about funeral arrangements stick? I suggest that the PWA write detailed directions about his wishes and distribute them to his attorney-in-fact, his executor, and his family. For some biological families, an expression of wishes is sufficient. However, if the PWA truly believes that his biological family will ignore his wishes, I suggest that he purchase in advance a funeral plan with a reputable mortuary.¹⁰⁶ His doctor and the hospital should be informed of his plans. Quite often upon death, the hospital personnel will notify the funeral home immediately, and the funeral home will then collect the body and proceed with the plans as directed before counter orders arise. To be blunt, I have found that families who wish to impose their wishes as to funeral arrangements are often unwilling to overturn prepaid plans and thus become financially liable for new plans. In other words, the biological family is presented with a *fait accompli*.

What if the fight is not prevented? What can the lawyer do? Certainly, one starts with mediation. In this case, I have found that clergy persons are often helpful (but to be truthful, sometimes make it worse). If mediation fails, the traditional response is, of course, to litigate. The first question is: Do you have a client? The PWA is deceased. The most likely client is the surviving life partner. Does he wish to litigate? Many life partners do not have the emotion, energy, or money to contest these issues in court. Suppose, however, the life partner has the resources to litigate, whether the resources are merely energy and time or money. You must next ask: Does your new client have standing? What right does he have over the body of the decedent?

102. But Ohio *has* adopted the Uniform Anatomical Gift Act, OHIO REV. CODE ANN. § 2108.02(A) (Anderson 1976), which allows a person to donate his body or its parts to various individuals or institutions for research, transplant, or the advancement of science. OHIO REV. CODE ANN. § 2108.02(B) (Anderson 1976). However, even these gifts can be challenged by relatives. Moreover, this statute has little relevance for PWA's whose organs cannot be used for transplant and whose bodies are unwelcome in many funeral homes. See E. KUBLER-ROSS, AIDS: THE ULTIMATE CHALLENGE 46 (1987).

103. *Herold v. Herold*, 3 Ohio N.P. (n.s.) 405 (1905); *Smiley v. Bartlett*, 6 Ohio C.C. 234 (1892); *Hayhurst v. Hayhurst*, 4 Ohio L. Abs. 375 (1926).

104. The day before his death Ernest Herold signed a paper indicating his father was to have control over his body and bury him in Hamilton, Ohio. The court instead awarded custody of the body to Mr. Herold's widow who wished to bury him in Cleveland.

The fact that this deceased person has a child, who is living in Cleveland, weighs a great deal with this court in the consideration of this case; she is a little child now, only about three years of age, but after a while she will want to know who her father was, and where her father's body rests. If her father's body is interred in the city of Hamilton she can not go to his grave and pay the tributes of respect and affection that she would like to pay, but if the body rests in the city of Cleveland this little girl can visit that grave, and can plant her flowers there, and show that she loves her father, even though she was only three years of age when he died.

Herold, 3 Ohio N.P. (n.s.) at 411.

105. See Annotation, *supra* note 101, at 1040.

106. But see *Emotional Distress Charged by Family of HIV Carrier*, 3 AIDS Pol'y & L. (BNA) No. 1, at 6 (Jan. 27, 1988); *ADVOCATE*, June 11, 1985, at 25, col. 3; Gross, *Treating AIDS Deaths with Dignity*, N.Y. Times, Feb. 13, 1987, at 15 (nat'l ed.); Johnson, *Anti-AIDS Bias By Undertakers is Ruled Illegal*, N.Y. Times, Jan. 15, 1987, at 15, col. 6 (nat'l ed.); *NYC Tightens Reins of Funeral Costs*, Washington Blade, Feb. 6, 1987, at 13.

Obviously, he has no biological or marital ties. The next of kin status acquired through a durable medical power of attorney expires on the death of the person who granted the power. If the life partner is either the executor or administrator of the estate, he has some legal standing, but is that sufficient standing to litigate over the decedent's body? If the decedent has left explicit written instructions granting the life partner "rights" in the body, perhaps the life partner can claim a "property interest." Assuming one has standing, which court has jurisdiction? If funeral directions were part of the will, does the probate court have jurisdiction? What cause of action would grant jurisdiction to a common pleas court or a court of general jurisdiction? Can a life partner sue in conversion?

In Boston, a gay man recovered the ashes of his lover from the biological family after a court battle. In that case, the deceased had clearly expressed his wishes both orally and in writing in his hospital records. The Massachusetts court looked at the surrounding circumstances, namely that the deceased had been estranged from his mother and sister for over 10 years, and that the deceased had clearly expressed his wishes. The court awarded the lover the ashes.¹⁰⁷

I raise the questions concerning the body disposition issue to illustrate three quandaries faced by lawyers who handle AIDS issues and clients. First, the questions of standing, jurisdiction, and causes of actions are "fascinating" questions to most creative lawyers. The issues raised are on the cutting edge of the law, they are not resolved, and they require the innovative lawyer to stretch her legal mind to solve the questions in her jurisdiction. However, what is "fascinating" to the lawyer is generally not "fascinating" to the client, who will find resolving such cutting-edge issues time consuming, energy draining, and costly. So when the client does his cost-benefit analysis, he may opt not to litigate.

Second, an argument which appeals to some clients as a basis for bringing such litigation is that the case will resolve the issue for others who find themselves in similar situations in the future. In many AIDS-related cases, this argument also appeals to the survivors. However, the lawyer must help the potential client make an honest assessment of who in the long run will benefit from the lawsuit. A favorable local court decision will be extremely helpful in that area, but without a state supreme court precedent, the value may be a limited local anomaly. Like many of the AIDS issues, body disposition is a state issue as opposed to a national issue, so the precedential value may not be worth the cost.

Third, assuming that you have a client who is willing to pursue the issue to finality, does the cost-benefit analysis stop there? If the potential litigator is an individual who provides *pro bono* services to HIV seropositive persons, is the issue worth pursuing if time is taken from representing the living? Can you justify taking time from discrimination issues, the resolution of which may keep clients working or allow them access to proper medical care?

Traditionally, cases which would help large numbers of people in similar situations have been the meat of law reform cases brought by organizations

107. *Clarke v. Reilly*, No. 87-0939 (Mass. Sup. Ct. May 25, 1988).

representing the particular community affected. Lambda Legal Defense, GLAD, NGRA, ACLU, and NLG¹⁰⁸ are all organizations which undertake representation of clients whose issues are important to the AIDS community. Overall, however, the actual number of cases on a national level is small, so your local case may not qualify for national attention. A fall back source is state or local organizations or branches of national organizations; however, smaller groups often lack the financial and personnel resources to initiate law-reform type legislation. AIDS issues strain both the boundaries of the law and the already stretched resources of public interest organizations. The individual lawyer and her client caught among these forces have hard choices.

The usual result of a contest between life partners, friends, and the biological family is that tradition wins. Most life partners do not have the money, time, or energy to fight this particular battle. (Often life partners are themselves HIV seropositive, have AIDS or, at a minimum, are exhausted by the death battle.)

6. Health Insurance

An essential part of estate planning is an examination of the client's assets and projected income in order that he may make sound plans for a secure financial future. The same general type of review should be conducted for PWA's; however, the parameters of the examination conducted are, of necessity, much narrower. The median age of PWA's in the United States is thirty-six, with most affected individuals falling between the ages of twenty and forty-nine.¹⁰⁹ Approximately eighty percent of those persons diagnosed with AIDS die within two years.¹¹⁰ The average incubation period of the virus from infection to AIDS is approximately 7.8 years.¹¹¹ What do these statistics mean for the client? First, the median age of thirty-six means that few of the clients will have engaged in any retirement or disability planning or long-term savings plan. Second, the rapid progression of the disease, often coupled with debilitating effects, will quickly affect the PWA's ability to work and, consequently, his ability to provide health care insurance. Third, HIV seropositive persons who do serious planning upon notification of infection will have a longer period to prepare. However, if their seropositivity becomes known, this information may have a detrimental effect on their employment and insurance coverage long before any symptoms truly affect their ability to work.

108. See *supra* note 44. Gay & Lesbian Advocates & Defenders (GLAD), P.O. Box 218, Boston, MA 02112, (617) 426-1350.

109. *AIDS Robbing Americans of Years of Life*, CDC Says, Am. Med. News, Feb. 27, 1987, at 16; CDC, AIDS WEEKLY SURVEILLANCE REP., June 27, 1988, at 5. But see Ricklefs, *Living with AIDS: Thanks to New Drugs, Patients are Surviving and Working Longer*, Wall St. J., Sept. 2, 1988, at 1, col. 1.

110. Lewandowski, *The Immunopathogenesis of AIDS*, 3 J. MED. TECH. 145, 145 (1986).

111. CDC, *San Francisco Study Concludes Mean Incubation Period for AIDS is 7.8 Years*, 2 AIDS/HIV RECORD Nos. 11-12, at 5 (June 15, 1988). But see *San Francisco Reports Longer Incubation Period*, 3 AIDS Pol'y & L. (BNA) No. 2, at 5 (June 29, 1988) (researchers at San Francisco's Dept. of Public Health conclude median incubation period is 11 years).

a. *Employer Provided Health Insurance Plans*

The most valuable asset PWA's have is a valid health insurance policy. Once a person is diagnosed as being seropositive and that fact becomes available to insurers, obtaining a new policy is virtually impossible.¹¹² So a primary goal becomes maintaining current coverage. For the person already diagnosed with AIDS, the goal may be as grim as staying covered until death. Therefore, one important area of discussion with a new client who is either a PWA or HIV seropositive is the current status of his health insurance. Suppose a person comes to you and indicates that he is HIV seropositive and is currently covered under health insurance at his job. You will want to find out if his policy is group health insurance (probably yes),¹¹³ if he applied for coverage on the first day of employment (rather than waiting for an open enrollment period), and whether the company insurance is self-insurance administered by an insurance company or a group policy purchased by the company. These questions become important in terms of whether the policy will be honored. If a person has applied for health insurance under a group policy purchased by the employer, the potential problems are minimized. Applications completed on the first day of employment usually require no medical exam or questionnaires. No claim of misrepresentation is likely. Insurance companies require no HIV testing for large group policies.¹¹⁴ Group policies may have a pre-existing illness¹¹⁵ clause, but it is generally of short duration, if it exists at all.

Assuming the client is covered, he needs to stay covered. The best advice is not to change jobs; this advice, while sound from a theoretical point of view, may not be emotionally wise or practical when one remembers that seven years may go by before frank AIDS develops. Staying in a job one hates for seven years out of fear of losing health insurance coverage may not be psychologically possible. If the person is terminated, a new federal law may require the employer to allow the ex-employee to purchase at the group rate the same insurance coverage under an individual policy.¹¹⁶

112. See Schatz, *supra* note 22, at 1786.

113. Eighty-five percent of all medical insurance is purchased on a group basis. *Id.* at 1795. See Hammond & Shapiro, *AIDS and the Limits of Insurability*, 64 MILBANK Q. 143, 162-63 (Supp. 1986).

114. It is the practice of commercial carriers of group health insurance that "[p]eople who apply for the coverage when they first become eligible, at least in the larger groups, are accepted without regard to their medical condition or history. . . . Most commercial insurers require medical information from persons who wish to be covered in groups after the date of their first eligibility or who are purchasing contracts on an individual basis." Presentation by Jerrold I. Ehrlich, Associate General Counsel, Empire Blue Cross and Blue Shield, at 2 (Apr. 1986) (copy on file with the Ohio State Law Journal).

115. The New York State Insurance Department defines a pre-existing condition as:

The existence of symptoms which would ordinarily cause a prudent person to seek diagnosis, care or treatment within a two year period preceding the effective date of coverage of the insured person, or a condition for which medical advice or treatment was recommended by a physician or received from a physician within a two year period preceding the effective date of coverage of the insured person.

Regulation 62, 11 NYCRR 52.2(U). A person who knows that he or she has AIDS when applying for insurance has a pre-existing condition. The more perplexing issue is whether testing HIV seropositive yet remaining asymptomatic would qualify as a pre-existing condition. No insurance company has yet considered HIV seropositivity alone as a pre-existing condition. Clifford & Luculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1821 n.76 (1987).

116. Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. §§ 1161-68 (Supp. IV 1986). Pursuant to § 1168, the Treasury Department has issued proposed COBRA regulations which appear at 52 Fed. Reg. 22,716 (June 15, 1987).

This right will extend coverage for eighteen months.¹¹⁷ If the PWA seeks a new job, the best lawyerly advice is to choose a company with group health insurance and join the first day. Knowing which company to choose in terms of health insurance is not always easy. Company group health insurance can, in certain circumstances, require a medical exam and questionnaire, which could reveal the client's HIV status or open him to a later charge of fraud.

Some companies are small, and their insurance is classified as "small group" health insurance.¹¹⁸ In these cases, many insurance companies do require medical exams and questionnaires. The medical exams may include the HIV screen. In addition, some companies are self-insurers; the name of the administering insurance company disguises this fact. (For example, The Ohio State University is a self-insurer, and Blue Cross/Blue Shield is merely the administering body.) Self-insurers can, within wide limits, decide whom and what they wish to insure; they decide on what benefits an employee gets. Examine such plans carefully. If a client is terminated, he will want to exercise his COBRA¹¹⁹ rights and exercise them on a timely basis. Under COBRA, the same insurance package is extended, and no new medical information is gathered. If the client's choice is between making a car payment and keeping the insurance coverage, walking or riding the bus is perhaps the better option. The bottom line is that you need to impress upon the HIV seropositive person the seriousness of the questions and issues surrounding a job change and its potential effect on insurance coverage.

If your client has AIDS and is covered by insurance, you will wish to ascertain

117. Covered employees who are terminated can receive COBRA benefits for 18 months from the date of the qualifying event. All others receive COBRA coverage for 36 months. A qualifying event occurs when three conditions are met:

First, it must be either i) the death of an employee covered by the group plan; ii) the termination (other than by reason of gross misconduct); iii) the divorce or legal separation of a covered employee from the employee's spouse; iv) a covered employee becoming entitled to Medicare benefits; or v) a dependent child ceasing to be a dependent child of the covered employee.

Second, the event must, according to the terms of the group health plan, cause the covered employee, or the spouse or dependent, to lose coverage under the plan, or to cease to receive coverage according to terms and conditions as in effect immediately prior to the qualifying event.

Finally, the loss of coverage need not occur immediately after the qualifying event, rather, the event must merely trigger the loss of coverage at some time in the future. In other words, the fact that a group contract or local law provides for a period of extra-COBRA continuation coverage when an employee leaves the group does not mean that the termination from employment will result in the loss of coverage. As discussed above, in order that COBRA rights attach, the qualifying event must occur after the effective date of COBRA, notwithstanding the date upon which the individual actually loses coverage.

AIDS LEGAL GUIDE, *supra* note 44, at A-76 (COBRA memorandum by K.M. Franke).

118. "Small groups" are generally considered those groups with less than 25 contract holders. One difference between large and small groups is that the pre-existing condition limitation clause is usually waived for members of large groups. Presentation by Jerrold I. Ehrlich, *supra* note 114, at 3.

119. The procedure for exercising COBRA rights is set out in the Lambda Legal Defense Fund's AIDS LEGAL GUIDE: [R]egulations set out rules for calculating the amount of time which must be afforded a covered employee or qualified beneficiary to elect such coverage. This time period must be provided at a minimum, and the employer may provide additional time if it so chooses. The election period must begin on the date on which coverage terminates under the plan by reason of the qualifying event, and ends 60 days after the *later* of i) the date that the qualified beneficiary would lose coverage on account of the qualifying event, or ii) the date that the qualified beneficiary is sent notice of his or her right to elect COBRA coverage. The election is considered to be made on the date that it is sent to the employer or plan administrator, and coverage must be provided retroactive to the date coverage would have otherwise been lost.

AIDS LEGAL GUIDE, *supra* note 44, at A-77 (COBRA memorandum by K.M. Franke).

some background information in anticipation of potential trouble. How was the insurance obtained? Are there likely to be questions of misrepresentation or pre-existing conditions? Even if your survey reveals a solid contractual relationship between the client and the insurance company, you should warn him that insurance companies have been known to deny coverage initially, claiming, for example, that any prior STD (sexually transmitted disease) is a pre-existing condition for AIDS or that the policy does not cover experimental drugs (azidothymidine (AZT), for example).¹²⁰ Most of these problems can be overcome in the long run; however, in the meantime, the going could get rough. Few persons are strong enough to deal with threatening letters in the mail or the accumulation of thousands of dollars of medical bills. For a person with a fatal disease, dealing with these issues causes stress and aggravation, two things a PWA does not need.

For the attorney asked to resolve such issues with insurance companies, I have a number of suggestions. First, insurance law is basically contract law. What did the insurance company promise? Watch in particular for conditions precedent to payment and conditions subsequent that destroy contract rights. Read the contract carefully; pay special attention to definitions. Your medical knowledge about AIDS will pay off in this situation. Pre-existing condition may be defined in the contract itself or may be limited by state law.¹²¹ You need to understand not only the concept, but also how the AIDS issue fits into the concept. Second, insurance is a regulated industry.¹²² Almost all states regulate insurance companies doing business within their states. However, the extent and nature of that regulation vary considerably. For example, Ohio has a very weak regulatory agency, while New York and California have agencies with strong powers of regulation.¹²³ You need to know how your state's system works or does not work. Third, be careful—all insurance programs are not necessarily within state regulation. In most states, self-insurers are not within the jurisdiction of state insurance commissions. Fourth, the general principles involved in insurance issues are not really new; consult your state's case law. Many general issues concerning pre-existing conditions and insurance application misrepresentation have already been litigated. Fifth, some insurance programs not regulated under state insurance commissions may come within the jurisdiction of ERISA.¹²⁴ ERISA prohibits companies from discriminating against employees based on the size of

120. See, e.g., *Philadelphia Blue Cross to Pay for AZT Treatment*, 1 AIDS Pol'y & L. (BNA) No. 7, at 6 (Apr. 22, 1987). Blue Cross of Philadelphia initially refused to pay for AZT but then changed its policy when the drug was federally approved. For more information on AZT, see *infra* note 203.

121. See, e.g., ARK. INS. DEPT. RULES & REG. 18 § 5(F); CAL. ADMIN. CODE tit. 10, § 2220.52(a) (West 1987); ILL. ADMIN. CODE tit. 50, § 2007.70(I) (1982); TEX. ADMIN. CODE tit. 28, § 3.3018 (Hart 1986).

122. See generally 2A COUCH ON INSURANCE 2d § 21:1 (rev. ed. 1984); DOBBYN, INSURANCE LAW IN A NUTSHELL 257-65 (1981).

123. Compare OHIO REV. CODE ANN. §§ 3901.01-3999.99 (Anderson 1971 & Supp. 1987) with CAL. INS. CODE §§ 1-15062 (West 1972 & Supp. 1988) and N.Y. INS. LAW §§ 201-1116 (McKinney 1985 & Supp. 1988).

124. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-461 (1982 & Supp. IV 1986). This Act regulates private, self-insurance plans which generally fall outside the scope of state regulation. For example, a Florida case illustrative of this problem involved a PWA suing a multi-employer self-insured trust fund. The PWA's attorney recognized that the insurer was regulated by federal law, not Florida insurance laws. *Florida AIDS Victim Files With Human Relations Commission Over Loss of Benefits*, AIDS Litigation Rep. (Andrews) 563 (Mar. 11, 1988) (discussing *Starkey v. Arivola Corp.*).

potential benefit liability.¹²⁵ ERISA provides minor regulation of such programs. Sixth, be persistent and tenacious. Insurance companies have a lot of money and batteries of attorneys; they count on wearing individuals down. Work with your state insurance commission, if it is at all amenable. Most insurance commissions are designed to protect the consumer even if not given all the tools to do so.

b. Public Health Insurance Programs

In a sense, the preceding discussion about having health insurance coverage is the best case scenario. Thirty-seven million Americans have no health insurance.¹²⁶ Your client may be one of these uninsured Americans. He can, of course, attempt to purchase an individual health insurance policy. However, except in those states where prohibited by law,¹²⁷ the insurance carrier will test for HIV antibodies and deny coverage when the test reveals them. A person unable to rely on private health insurance may have to access either the Medicare¹²⁸ or Medicaid¹²⁹ system. Attorneys who are not used to dealing with the elderly, the disabled, or the poor will now be faced with the mysteries of these systems. Few Americans who have not used these programs understand their jurisdiction or their workings.

Medicare is the medical insurance system connected with the social security system. To obtain Medicare benefits, one must be eligible for either the Social Security retirement or disability program.¹³⁰ Social Security eligibility depends upon

125. 29 U.S.C. § 1140 (1982).

Section 510 of ERISA prohibits an employer from discriminating against or discharging an employee for exercising rights under a benefit plan and from interfering with "the attainment of any right" to which an employee may become entitled under such a plan. Consequently, an employer may not fire an employee with an AIDS-related condition because he has filed a claim for benefits, to prevent him from filing a claim in the future, or to prevent him from achieving eligibility for benefits.

Leonard, *AIDS in the Workplace*, in *AIDS AND THE LAW*, *supra* note 15, at 109.

126. 133 CONG. REC. H 6498 (daily ed. July 22, 1987) (remarks of Rep. Weiss). Only two industrialized nations have no national health insurance programs: the United States and South Africa. *Id.*

127. Four states and the District of Columbia prohibit or restrict an insurer's ability to use the HIV antibody test. CAL. HEALTH & SAFETY CODE § 199.21(f) (West 1988) (prohibits HIV blood test results being used to determine insurability); D.C. CODE ANN. § 35-224 (1987) (prohibits insurers from denying or refusing to renew insurance because a person has tested HIV seropositive or because the person declines to take a test; prior to 1991, insurers may not require persons to take a test or use test results for adjusting rates); FLA. STAT. ANN. § 381-60615 (West 1986) (results of a serological test conducted under declaration of the secretary of the health department may not be used to determine insurability); ME. REV. STAT. ANN. tit. 5, § 9204 (Supp. 1987) (prohibits insurers from requiring applicant to reveal whether a test has been taken previously or the results of a prior test (repealed effective Oct. 1, 1988)); WIS. STAT. ANN. § 631.90 (West Supp. 1986) (originally prohibited insurers from requiring applicant to take the test or to reveal the results of such tests; statute was subsequently amended, permitting HIV testing if the state epidemiologist found the test medically reliable; see *Proposed Rule Would Allow Use of HIV Tests in Wisconsin*, 1 AIDS Pol'y & L. (BNA) No. 23, at 1 (Dec. 3, 1986)). A National Gay Rights Advocates survey shows that the insurance departments in Arizona, California, the District of Columbia, Delaware, Massachusetts, Michigan, and North Dakota have indicated that they forbid insurance companies to test applicants for HIV antibodies. Schatz, *supra* note 22, at 1793 n.67.

128. Social Security Amendments of 1965, 42 U.S.C. §§ 1395-95zz (1982 & Supp. 1986). Interpretive regulations appear at 42 C.F.R. §§ 400-03, 405-21. Medicare consists of two parts. Part A Medicare is officially called "Hospital Insurance Benefits for the Aged and Disabled" and provides protection against costs of inpatient hospital and home-health care. 1981 MEDICARE EXPLAINED I (CCH). Part B is called "Supplementary Medical Insurance Benefits for the Aged & Disabled" and covers the costs of physicians' services and other items not covered under Part A. *Id.* The overall program is administered by the U.S. Department of Health & Human Services.

129. Social Security Amendments of 1965, 42 U.S.C. §§ 1396-96s (1982 & Supp. IV 1986). Interpretive regulations appear at 42 C.F.R. §§ 400-03, 430-56 (1987). Since Medicaid is a joint program of the federal government and the individual states, each state has its own laws and regulations.

130. Four ways exist to become eligible for Medicare. First, persons who have reached age 65 and are entitled to

having paid into the system for a certain period. If the PWA is not eligible for Medicare, he must rely on Medicaid, which is a federally sponsored program of health care run by the states for the indigent.¹³¹ Neither of these programs has been receptive to persons with AIDS and only recently has access been somewhat facilitated.¹³²

The attorney representing the PWA or HIV seropositive person must first help him determine the program for which he is eligible. Therefore, the attorney must gather the client's work history. If the client has been primarily employed in the private sector, he may have access to Social Security Disability and Medicare. One way to ascertain work history is to suggest that the client send in the appropriate Social Security form (available through your local Social Security office) to determine the number of covered quarters.¹³³ If the client has an employment history in state, local, or federal government, he is not eligible for Social Security per se and should contact the retirement system connected with his past work to see if any disability benefits have accrued.

If the attorney determines that the PWA will have to rely on Medicaid, prior planning may or may not be helpful. Preparing an elderly person for Medicaid coverage has become an art, and some attorneys specialize in arranging assets to meet Medicaid rules.¹³⁴ However, such preparation must usually take place two years before coverage is needed.¹³⁵ Persons with AIDS do not have sufficient lead time because of the rapid progression of the disease. If the person learns of his

Social Security retirement or survivor benefits or Railroad Retirement benefits are eligible. Second, those 65 and older who do not qualify for Social Security or Railroad Retirement may enroll and purchase Medicare coverage by paying a monthly premium. Third, persons with end-stage renal disease who require dialysis for a kidney transplant may be eligible for Medicaid. Finally, disabled persons under 65 may be eligible if they have received monthly Social Security or Railroad Retirement disability benefits for 25 months. See H. McCORMICK, *MEDICARE AND MEDICAID CLAIMS AND PROCEDURES* (2d ed. 1986); Dombi, *Medicare Guide for the Private Practitioner*, in *ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT* 179, 182 (1986).

131. Medicaid eligibility is composed of three parts: Categorical eligibility (42 U.S.C. § 1396a(a)(10) (1982)), medically needed eligibility, and financial need. The states are responsible for setting income limits for the medically needy that are "reasonable" and based on family size. Collins, *Medicaid Issues in Estate Planning*, in *ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT* 211, 217 (1986).

132. In June 1987, the Social Security Administration (SSA) refused to revise its disability benefits regulations to conform to the new CDC definition adding dementia and emaciation as confirming symptoms of AIDS. Also, AIDS had to reach a disabling stage before a PWA was eligible for disability benefits. *Social Security Says No to Broader AIDS Definition*, 2 AIDS Pol'y & L. (BNA) No. 11, at 4 (June 17, 1987). The SSA reversed this decision in July when it revised its definition to include dementia and emaciation. Under the new definition, PWA's automatically qualify for Social Security disability benefits if they have the defined symptoms and are unable to work. However, it still takes up to five months before the benefits begin. *Social Security to Expand its Definition of AIDS*, 2 AIDS Pol'y & L. (BNA) No. 14, at 6 (July 29, 1987). In February 1988, the SSA added AIDS to the list of presumptive disabilities for purposes of obtaining Supplemental Security Income. 53 Fed. Reg. 3739 (to be codified at 20 C.F.R. § 416). This action allows PWA's applying for benefits to receive up to three months' payments prior to the determination of the individual's disability. Thus, the sooner the PWA starts receiving Social Security disability benefits, the sooner he will qualify for Medicare. See *supra*, note 131.

133. The form is Social Security Request for Earnings and Benefits Estimate Statement, Form No. 7000-4 PC OPI.

134. An example is PRO Seniors, Inc., a law project sponsored by the elderly in Cincinnati, Ohio. PRO Seniors has written a helpful and informative article entitled *Financial Planning for Long-Term Care: Medicaid Eligibility Considerations*. Copies can be obtained by writing: PRO Seniors, Inc., Executive Bldg., Suite 201, 35 East 7th Street, Cincinnati, OH 45202.

135. The Supplemental Security Income (SSI) statute, 42 U.S.C. § 1382b(c), requires assets to be transferred 24 months prior to applying for benefits. However, the Medicaid transfer of assets statute allows states to be more or less restrictive than SSI. 42 U.S.C. § 1396p(c) (1982).

seropositivity long enough before the onset of the handicapping disease, planning for Medicaid is possible.

Even if a PWA is eligible for Medicare, he might have to go on Medicaid in the interim between illness and the beginning of the Medicare benefits. Medicare rules currently require two years of Social Security disability before benefits are paid.¹³⁶ Often the PWA either has died or has had to rely on Medicaid before becoming Medicare eligible. To be Medicaid eligible, a person can have no more than approximately fifteen hundred dollars in assets.¹³⁷ For many PWA's, this requirement means that they will have to destitute themselves and give up possessions in order to receive medical care.

Access to the Social Security or the Medicaid system is a challenge for the healthy and the educated. Some persons who stress the need for PWA empowerment have suggested that the PWA or PWARC access the system individually and personally. My experience is that no empowerment occurs for the PWA through fighting these systems.¹³⁸ A patient advocate is a necessity. Social workers are trained to access these systems and to advocate for the client; most local AIDS organizations provide such social services. The lawyer's job, in my opinion, is to lay the groundwork, make the connection, and stand back and let the client advocate do her job. At the minimum, such work should be teamwork where the lawyer steps in only when "the majesty of the law"¹³⁹ needs to be invoked.

7. Life Insurance

Your PWA client will probably also want to discuss life insurance. The basic question you will be asking is whether his current policies are likely to be paid. Unlike health insurance issues, life insurance issues seldom affect the quality of daily life. Beware, however, of life insurance issues if your client needs to become a Medicaid recipient. The value of the life insurance policy is considered an asset of the client under Medicaid rules, and the client may have to cancel the policy to become eligible.¹⁴⁰ Two ways exist to circumvent the Medicaid spend-down requirements.

136. For a disabled person to be eligible for Medicare, he or she must have been receiving Social Security disability benefits for 24 months. 42 U.S.C. § 426(b).

137. See *supra* note 131. The current income and resource levels for New York and California are \$2,950.00 and \$1,700.00, respectively. Collins, *supra* note 131, at 227. Ohio's limit is \$1,500.00 for an individual. OHIO ADMIN. CODE § 5101:1-39-05 (1987). The recently enacted Medicare Catastrophic Coverage Act of 1988, Pub. L. 100-360, which will become effective in September 1989, will change the amount of resources that may be retained by an individual seeking medical assistance.

138. Arthur Leonard, one of the nation's foremost legal experts on AIDS, describes the system this way: AIDS also poses severe challenges to the entire structure of health care and public assistance in the United States. For perhaps the first time, large numbers of well-educated and assertive middle and upper-middle class white men (many of whom have a homosexual orientation) are confronting the public welfare system as desperate petitioners, and their articulate outrage at the petty bureaucracy and inadequate services they encounter force society to confront an issue long avoided: our stingy and demeaning public benefits system, with its lengthy waiting periods, arcane eligibility rules, and inability to respond flexibly to new phenomena without time-consuming legislative processes, administrative rulemaking, or court orders through litigated challenges. Leonard, *Foreword: The Legal Challenge of AIDS*, 12 *Nova L.J.* 961, 963 (1988).

139. "The majesty of the law" is a favorite phrase of my colleague, Professor Douglas Whaley. He uses the phrase to illustrate those occasions when a lawyer must cite to a specific statute or case to clarify for an opponent the obligations clearly imposed by the law and the dire consequences of not responding punctually to those obligations.

140. See Collins, *supra* note 131, at 219.

First, if the policy is owned by another party, such as the client's parents, the policy does not count as an asset of the client.¹⁴¹ Second, the policy can be converted into an irrevocable funeral trust, and the client can still be eligible for Medicaid.¹⁴²

To determine the likelihood that a currently held life insurance policy will be paid upon death, a few basic questions must be answered. First, when was the policy purchased? After two years, the policy usually becomes "incontestable." Check the policy for an incontestability clause.¹⁴³ Second, did the policy require a medical exam? If the client passed the required exam, then a representative of the insurance company (the doctor) must have found the client eligible for insurance. If the policy is a group policy (generally obtained through employment), no examination is usually required. Third, did the client have to answer questions in writing? Often a copy of the application form with the answered questions is attached to the policy. Review the questions with the client. If the client answered all the questions accurately and the company then issued the policy, the policy should be paid.¹⁴⁴ If and when the client dies of AIDS, the insurance company may initially deny payment; however, if the client has not misrepresented anything and the policy terms are met, eventually the persistent beneficiary should prevail.

Ask the client about the beneficiary. Life insurance proceeds do not pass through the estate and may, under most circumstances, be free from inheritance taxes.¹⁴⁵ Often the PWA wishes to name his life partner or a friend as the beneficiary. Sometimes life insurance applicants have been told that they cannot name a person who is not a blood or marital relative as a beneficiary. This statement is false. Everyone has an insurable interest in his own life and can choose to benefit whomever he chooses.¹⁴⁶ If the beneficiary named is not the person desired, help the client institute a beneficiary change. Sometimes, the client has been advised to name his

141. See, e.g., OHIO ADMIN. CODE §§ 5101:1-39-26(A) (certain property not counted as resource), 5101:1-39-05(A)(8)(c) (resource not counted if current market unavailable) (1987).

142. See, e.g., *Surgeon v. Division of Social Services*, 357 S.E.2d 388 (N.C. App. 1987). "Only the following resources are allowed for burial exclusion: irrevocable burial trusts, irrevocable burial contracts, any other irrevocable arrangements established for burial expenses . . ." *Id.* at 392. See also, e.g., OHIO ADMIN. CODE § 5101:1-39-274 (Baldwin 1987).

143. One authority discusses the incontestability clause as follows:

The incontestability clause prevents the insurer from disputing the validity of a policy after the policy has been in force during the life of the insured for a period of two years from its date of issue. . . . Even prior to the running of the two-year period, misrepresentations, omissions, or incorrect statements do not prevent recovery under the policy unless the insurer can show: (1) that the misrepresentations, omissions, or incorrect statements were fraudulent; (2) that they were material to the acceptance of the risk by the insurer; or (3) that the insurer, in good faith, would not have issued the policy at the same premium rate, or at all, if the true facts had been made known. Moreover, once the incontestability clause takes effect, even actual fraud in the application cannot be contested by the insurer unless it is expressly excepted in the clause itself.

Clifford & Iuculano, *supra* note 115, at 1818.

144. Few AIDS insurance claims are fraudulent.

[A]n actuary for the ACLI [American Council of Life Insurance] noted that it would be wrong to assume that all or even most of the recent AIDS claims were fraudulent. He added: "It's possible that companies did not ask the right questions and therefore the applicants did not misrepresent their health conditions."

Hiam, *Insurers, Consumers and Testing: The AIDS Experience*, 15 LAW, MED. & HEALTH CARE 212, 218 (1987-88).

145. G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 27.183 (M. Rhodes rev. ed. 1984); Lovas, *supra* note 60, at 354; Mock & Tobin, *supra* note 56, at 197.

146. Mock & Tobin, *supra* note 56, at 195-96; *Coverage Offered After Past Denial*, 1 AIDS Pol'y & L. (BNA) No. 20, at 3 (Oct. 22, 1986) (North American Life & Casualty Co. agreed to offer life insurance after previously denying it to a man who named same gender friend as beneficiary).

estate as the beneficiary. For the average PWA, this advice is foolish. If the residuary legatee of the estate is a life partner or friend, inheritance taxes will have to be paid on the proceeds, and, since the person is not a recognized relative, the tax rates are much steeper than those on inheritance by biological or marital family members.¹⁴⁷

Some clients wish to obtain life insurance even though they are HIV seropositive. As an employee, the client may be able to obtain group life insurance without a medical exam (and HIV screen) or without a medical questionnaire.¹⁴⁸ Such policies are usually for the amount of the client's annual salary or some multiple thereof. However, such group life insurance is usually offered the first day of employment. If the employee attempts to obtain insurance after that date, during a period of open enrollment, many policies will require a medical exam or questionnaire.¹⁴⁹ If the client wishes to purchase life insurance as an individual, he should be advised that in all likelihood the insurance company will require a medical exam with an HIV screen and a questionnaire. Moreover, the client should be advised that if he chooses to apply and is tested, the results of the test and the decision of the insurance company will be sent to a national insurance clearinghouse called Medical Information Bureau (MIB).¹⁵⁰ The best way to obtain life insurance is to shop around with independent agents. Some policies for amounts under fifty thousand dollars may not require medical exams. If the policy requires a questionnaire, the client must answer accurately to ensure a valid policy. In shopping around, the client must be warned that insurance agents work for the insurance companies and have no confidential or fiduciary relationship with the client. Therefore, the client should not share information with the agent beyond answering accurately the questions on the application. The two-year incontestability clause is important here as well. The client should seek life insurance as early as possible for that reason. Most clients are interested in life insurance only to provide burial fees. Such a policy need only be for a small amount and in some cases may be available to your client.

B. *Employment Law*

Employment issues are crucial to PWA's and HIV seropositive persons for a number of reasons. The most obvious and crucial reason is the basic desire to eat and be sheltered. Without a paycheck, such necessities are seldom to be had. The second

147. Lovas, *supra* note 60, at 382-83.

148. Sometimes insurance companies require evidence of insurability.

Although no screening takes place in most group situations, there are at least three instances in which a group plan may require evidence of insurability. These exceptions include: (1) small groups, (2) late entrants to a group plan, and (3) large amounts of life insurance that are used to supplement basic coverage. . . .

Underwriting standards are stricter for small groups, for example, because the size of the group is insufficient to spread the risk broadly enough to absorb the effect of adverse selection.

Clifford & Luculano, *supra* note 115, at 1809 n.17.

149. *Id.*

150. The Medical Information Bureau (MIB) is a Boston-based inter-company databank that insurance companies use to screen applicants. The stored medical information is exchanged with the Bureau's 800 member companies. The Bureau's rules assure confidentiality, but "[b]ecause MIB is an unregulated private corporation, there can be no assurance that its information is kept even from its own 230 employees, let alone the tens of thousands of insurance employees and agents who could obtain access directly or indirectly if there were any failure of self-regulation." Hiam, *supra* note 144, at 220.

reason is the importance of work-related insurance (discussed in the preceding section). However, an equally powerful emotional and psychological issue exists for employment, namely maintenance of self-integrity by knowing one is still a useful member of society. Most of the persons struck down by AIDS are beginning or at the midpoint of their life work; they have not yet begun to see "retirement" as an enjoyable potential. To be robbed of their work is devastating.

Asymptomatic HIV seropositive persons are fully able to work.¹⁵¹ Even persons with ARC or AIDS have many months of valuable working ability before them and can often return to work after a bout with an opportunistic disease.¹⁵²

When first faced with AIDS, many employers responded by firing and refusing to hire PWA's, seropositive persons, and persons whom they believed to be seropositive or have AIDS. No law existed on the subject, and scientific information on the transmission of the disease was scarce. Many educators said that two diseases existed: AIDS and AFRAIDS, acute fear reaction to AIDS.¹⁵³ Since those early days, AIDS law has been made both in the courts and in the legislatures. Employer reactions have, in many cases, conformed to the law and to reason. However, much employment discrimination continues.

A client can come to you with an employment problem in three possible postures. First, he could come to you before the occurrence of any problem and seek advice on how to cope with AIDS in the workplace before his status is known, and the issue truly arises. Second, the client could call in the midst of a crisis at work: "They have just found out I am HIV seropositive (or I have AIDS), and they are threatening me with transfer (or firing or whatever)." Third, a PWA or HIV seropositive person could ask for help after the fact: "I was fired two weeks ago. They said it was because my cash drawer was short, but I know they were just looking for a reason after they found out I was HIV seropositive." Of course, any sane lawyer prefers the client in the first scenario; in fact, the third scenario is almost always the case.

Regardless of the scenario, the legal approach is often unlikely to be litigation. Strategy requires accounting for some special factors associated with AIDS. First of all, most employment actions of a discriminatory nature occur after the AIDS diagnosis. Generally speaking, HIV seropositive persons, having seen the consequences of AIDS on other employees, work very hard to keep their antibody status a secret. When a person with AIDS is fired, transferred, or harassed because of his illness, he often wishes to take the least stressful method of settlement because the cost in time, money, and energy of litigation is a poor investment in the eyes of many PWA's. Many employees who are treated differently because of AIDS choose to settle for only their bottom line needs (often continued health insurance coverage). If these needs cannot be obtained through settlement within a reasonable time, PWA's may simply disappear from their lawyers' offices and get on with the business of

151. Leonard, *supra* note 15, at 19.

152. *Id.*

153. *Afraid's*, THE NEW REPUBLIC, Oct. 14, 1985, at 7.

"living" with AIDS. Since the duty of the lawyer is to abide by and carry out client wishes, the potential lawsuit is gone.

In addition, many lawyers who represent PWA's against employers and insurance companies believe that the defendants deliberately stall at every turn, counting on the plaintiff to die in the meantime.¹⁵⁴ The death of the client-plaintiff can benefit the defendants in a variety of ways. First, some causes of action do not survive death.¹⁵⁵ Second, in many cases the potential damages are significantly reduced (which fact, in turn, may make the suit less attractive to pursue).¹⁵⁶ Third, no one may exist to carry on the suit; the executor may decide not to pursue it, and the life partner may be too burned out or sick to encourage continuance. Remember that since the life partner has no legal relationship to the deceased, he may not pursue a suit for wrongful death.¹⁵⁷ Fourth, an issue that lessens the likelihood of a successful suit is that lawsuits are matters of public record. Many persons who contract AIDS were in the closet¹⁵⁸ prior to infection with the disease, and becoming a PWA does not change the psychological make-up that kept them in the closet. While many brave persons have used AIDS to come out in a dramatic and effective way,¹⁵⁹ others have died in the closet, even to the extent of disguising the cause of their deaths in their obituaries.¹⁶⁰ In other cases, family pressure keeps the nature of the illness and the consequent death under wraps.¹⁶¹ The bottom line is that your

154. Schatz, *Employment Discrimination and AIDS: A Practical Guide for Plaintiff's Lawyers*, in AIDS PRACTICE MANUAL, *supra* note 44, at § IV-3; NGRA, Position Paper on AIDS and Insurance, at § V. *See Sense of Urgency Seen in Pursuing AIDS Cases*, 1 AIDS Pol'y & L. (BNA) No. 15, at 7 (Aug. 13, 1986). For an example of a plaintiff with AIDS receiving an early trial date, see *Schneider v. Flowers*, 137 Misc. 2d 512, 521 N.Y.S.2d 647 (N.Y. Sup. Ct. 1987).

155. Most states have some form of survival statute which permits a tort action to continue after the death of the plaintiff, but most of these statutes exclude certain torts involving intangible personalty interests, such as defamation. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 126 (5th lawyer's ed. 1984) [hereinafter KEETON]. For a good example of an AIDS defamation case, see *Saxton v. Vanzant*, No. 86-CIV-59 (Ohio C.P. Ct. settled June 1986); *Defamation Suit Asks \$1.5 Million in Damages*, 1 AIDS Pol'y & L. (BNA) No. 7, at 3 (Apr. 23, 1986).

156. Damages for emotional distress or pain and suffering are not awarded in many states on the ground that such damages are a windfall to the heirs. KEETON, *supra* note 155, at § 126.

157. Wrongful death statutes often designate spouses, heirs, or children as beneficiaries, and preclude recovery by those who actually suffer loss, but fall outside the named group.

A live-in lover, for example, is neither spouse nor heir, and though utterly dependent upon the decedent cannot recover as a member of those classes. . . . It is thus possible that a relative who had never met the decedent will recover, or that no one will, while a dependent who suffers a serious loss goes uncompensated.

KEETON, *supra* note 155, at § 127 (footnotes omitted).

158. "Coming out of the closet" is the developmental process through which gay persons become aware of their affectional and sexual preferences and choose to integrate this knowledge into their personal and social lives. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 J. HOMOSEXUALITY 47 (Fall 1981). Researchers have identified different stages in the coming out process, and note that not every individual follows each stage or evolves through all of them. "Some become locked into one stage or another and never experience identity integration." Coleman, *Developmental Stages of the Coming Out Process*, 7 J. HOMOSEXUALITY 31, 32 (Winter/Spring 1981). One researcher lists the following "milestone events" in the coming out process: 1) awareness of same-sex attractions; 2) same-sex acts and experiences; 3) understanding what the word "homosexual" means; 4) questioning socially-prescribed heterosexual identity; 5) feelings labelled homosexual but not self; 6) self-designation as homosexual; 7) involvement in first homosexual relationship; 8) initial disclosure to significant non-gay other(s); 9) awareness of self as having positive gay identity. McDonald, *supra* at 51.

159. *Honolulu Editor Bill Cox Combats the Stigma of AIDS by Breaking His Own Story*, PEOPLE, Sept. 22, 1986, at 49; Galen, *Living With an Illness That Kills*, Nat'l L.J., Mar. 23, 1987, at 1, col. 1 (Dan Bradley, past president of the Legal Services Corp.).

160. *Omission of AIDS From a Report on Liberace's Death Is Defended*, N.Y. Times, Feb. 14, 1987, at 7, col. 1 (nat'l ed.); *A Designer's Death: AIDS and the Fashion Industry*, NEWSWEEK, June 9, 1986, at 25 (death of Perry Ellis).

161. For an example of family distaste, consider the Wolfe family of Columbus, Ohio. The Wolfes are a rich old family which owns the major newspaper and one of the major television stations in Columbus, Ohio. The paper is

advice to the client may be to litigate what you believe is a winning lawsuit, and the client may decline to litigate for any number of reasons. Last, but hardly least, the attorney may either take no *pro bono* work or have taken so much that she may not be able to litigate without payment. Many PWA's who have lost their jobs or who have low paying jobs simply cannot afford legal services. Furthermore, organizations which represent PWA's or HIV seropositive persons take only a few cases because of their limited resources, and they prefer, for legitimate reasons, cases that cleanly present the issues and the resolution of which will aid more than the individual plaintiff. In the third scenario above, the question of the "cash drawer shortage" probably keeps that case from being a "clean issue" case.

Ironically, while the impact of the disease and the social factors surrounding the disease have often mitigated against litigation, the law has become clearer and the success of a suit more likely. The main cause of action protecting a PWA, a PWARC, and perhaps the HIV seropositive person is "handicap law."¹⁶² When the epidemic became significant enough to attract the attention of the legal world, most employment discrimination law specialists believed that AIDS would be classified as a handicap and that persons with the disease would be in a statutorily protected class. However, some legal specialists argued that because AIDS is contagious the handicap laws do not cover such a condition.¹⁶³ The issue was settled by the now famous *Arline*¹⁶⁴ case. The plaintiff in *Arline* did not have AIDS, but she did have a contagious disease. Arline was a Florida school teacher with recurrent tuberculosis (an airborne disease when the TB is virulent, as contrasted with AIDS, which is a blood borne disease). Arline had been fired, and the lower court agreed with the defendant school board that a contagious disease was not covered by the 1973 Vocational Rehabilitation Act which applied to the public school in question. The United States Supreme Court granted certiorari, and, in an opinion by Justice

conservative and often quite homophobic. When a Wolfe son, who had moved to San Francisco, contracted AIDS and died, no obituary or funeral notice was in the paper. The body was flown home quietly, and no public funeral held. Moreover, the family then moved to overturn the son's will in part because he had left a significant portion of his estate to AIDS research. The family secret was known in the gay community but blew up publicly when a rival newspaper in northern Ohio discovered the facts. *Eddie's Legacy*, COLUMBUS MONTHLY, Apr. 1986, at 44; Paprocki, *The Eddie Wolfe Case*, COLUMBUS MONTHLY, Sept. 1987, at 14; Paprocki, *Inside the Wolfe Empire*, COLUMBUS MONTHLY, Apr. 1986, at 38; *Newspaper Heir's Will is Settled in Columbus*, Cleveland Plain Dealer, Dec. 13, 1987, at B-6; *Dispute Over Wolfe Will Heads for Trial*, Cleveland Plain Dealer, July 2, 1987, at B-11; *Judge Switch Made in Wolfe Will Contest*, Cleveland Plain Dealer, Mar. 31, 1987, at B-2; *Wolfe Heir Death Triggers Dispute*, Columbus Dispatch, Nov. 25, 1985, at C-1; *Estate of Media-heir Edgar Wolfe Embroiled in Family Controversy*, Columbus Citizen Journal, Nov. 25, 1985, at I; Meissner, *Will Splits Columbus Media Clan*, Cleveland Plain Dealer, Nov. 24, 1985, at A-25, col. 5.

162. Federal law is codified in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1982) (amended by The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 31 (1988)). State laws are collected in 8A Lab. Rel. Rep. (BNA). There are also local ordinances which prohibit handicap discrimination. See Leonard, *supra* note 15, at 23 & n.58. Some states have also enacted executive orders to protect individuals on the basis of handicap and/or sexual orientation. See Wasson, *AIDS Discrimination Under Federal, State and Local Law After Arline*, 15 FLA. ST. U.L. REV. 221, 268 n.219 (1987).

163. Memorandum by U.S. Dept. of Justice, Office of Legal Counsel, for Ronald E. Robertson, General Counsel, Department of Health and Human Services, in 2 Empl. Prac. Guide (CCH) ¶ 5028 (July 1986). The DOJ argued in its infamous opinion that even though AIDS was a handicap, firing someone because one fears the disease was not prohibited because the handicap act did not prohibit firing for fear (however unreasonable), only firing because of the handicap. This disingenuous conclusion was rejected in *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987). The DOJ recently reversed its position. See *Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, Daily Lab. Rptr. (BNA) No. 195, at D-1 (Oct. 7, 1988).

164. *Arline*, 480 U.S. 273.

Brennan, the Court held that federal handicap law covered contagious diseases. This decision laid the groundwork for various cases under both federal and state handicap law coming to the conclusion that AIDS is also a handicap.¹⁶⁵ However, in *Arline*, Justice Brennan specifically did not decide the issue of whether infection with a contagious disease (for example, HIV seropositivity) is considered a handicap.¹⁶⁶ Attorneys who work in the employment area would do well not only to be aware of the holding in *Arline*, but also to read carefully the opinion because Justice Brennan's opinion lends itself superbly to quotation.

Therefore, the attorney faced with potential AIDS employment discrimination cases needs to familiarize herself with two laws: the 1973 Vocational Rehabilitation Act¹⁶⁷ (federal handicap law) and her state's handicap law.¹⁶⁸ Nearly all the states have handicap laws based more or less on the federal law. But again, these laws are state idiosyncratic, and the lawyer needs to know her own state law. The variances can be significant. For example, at least two states explicitly exclude contagious diseases from coverage.¹⁶⁹ Some state laws cover both public and private employers; others cover only public employers.¹⁷⁰ In statutes that cover private employers, different jurisdictional criteria are employed; that is, the laws cover employers with a certain number of employees and not those with fewer employees.¹⁷¹ Moreover, some of the state laws are modeled almost word for word on the federal act, and, hence, federal precedent is extremely helpful.¹⁷² Other state handicap laws differ significantly from the federal statute, and states have developed their own case law.¹⁷³

At the outset, you will want to find out from the client the following information (at a minimum) to determine the beginning point of your representation. Does the client work for a private or public employer? If a public employer, is the employer within the jurisdiction of the Vocational Rehabilitation Act? For example, the military is specifically exempted from that law,¹⁷⁴ as is Congress.¹⁷⁵ If the employer

165. National Gay Rights Advocates compiled a survey of the fifty states and the District of Columbia on each state's official policy regarding AIDS and handicap discrimination. AIDS PRACTICE MANUAL, *supra* note 44, at App. III. See *AIDS Discrimination*, 8 Lab. Rel. Rep. (BNA) 421:675 (May 1988).

166. *Arline*, 480 U.S. at 282 n.7.

167. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1982 & Supp. III 1985) (amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988)).

168. This includes statutory law, case law, and administrative rules and policies. *E.g.*, OHIO REV. CODE ANN. § 4112 (Anderson 1980); OHIO ADMIN. CODE § 4112-5-02(I) (1980); Ohio Civil Rights Commission Official Policy Statement declares people with AIDS are considered handicapped within the meaning of OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980); *Lawson v. E.R. Towers, Inc.*, No. B3112385 (13570) 052086, slip op. (Ohio Civil Rights Comm. Oct. 24, 1986) (on file with the Ohio State Law Journal).

169. Georgia (GA. CODE ANN. § 34-GA-3(b) (1982)); Kentucky (KY. REV. STAT. ANN. § 207.140(2)(c) (Michie/Bobbs-Merrill 1982)).

170. Wasson, *supra* note 162, at 268 & n.219.

171. *E.g.*, Florida, fifteen or more employees (FLA. STAT. ANN. § 760.02(6) (West 1986)); Kentucky, eight or more employees (KY. REV. STAT. ANN. § 207.130(3) (Michie/Bobbs-Merrill 1982)); Ohio, four or more employees (OHIO REV. CODE ANN. § 4112.01(2) (Anderson 1980)).

172. See Wasson, *supra* note 162, at 269.

173. See *id.* at 270-71. See also AIDS PRACTICE MANUAL, *supra* note 44, at App. III.

174. *Smith v. United States Navy*, 573 F. Supp. 1361 (S.D. Fla. 1983), *aff'd*, 763 F.2d 1322 (11th Cir. 1985).

175. Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. § 791(b) (Supp. IV 1986), provides that "[e]ach department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. . . ."

The duties of this section have been further defined by administrative regulations:

is private, you will want to know the number of employees, as that is often the criteria on which state law jurisdiction is based. You will also want to know if the client is a union member. Last, you will want to know if the employee had an express contract with the employer (unlikely but possible), and, if not, you will want to explore whether an implied contract can be found.

If you find a potential violation of the federal handicap laws, the client may begin his odyssey by filing a complaint with the Office of Health and Human Services (HHS).¹⁷⁶ However, speedy action is not their forte. The first AIDS-related handicap complaint filed with HHS was filed by a nurse in Virginia, and it was not processed for over two years.¹⁷⁷ If the employer is covered also by the state act, the state cause of action may be more timely handled. Many states have a Human Rights Commission¹⁷⁸ or an equivalent administrative agency to investigate discrimination issues under the state law. The majority of these state agencies have declared in opinions or through adjudication that AIDS is a handicap.¹⁷⁹ Filing with the agency is sometimes a prerequisite to further action. Moreover, many agencies engage in mediation efforts to persuade recalcitrant employers to obey the law. Often the forms for filing state charges are simple and not burdensome. A lawyer in this area should become familiar with practice before the Commission and get to know state investigators and hearing officers who are often most receptive to settling difficult

(1) This subpart applies to executive agencies as defined in section 105 of Title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service. (2) This subpart applies to the U.S. Postal Service and Postal Rate Commission. (3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

29 C.F.R. § 1613.701(b) (1987).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. IV 1986), provides that:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

176. For individuals in the North Central Region wishing to file federal handicap law violations with HHS, the following excerpt details the procedure for this region:

The Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services is responsible for enforcing . . . Section 504 of the Rehabilitation Act of 1973. . . . Individuals who are handicapped due to AIDS or related conditions or who are perceived as handicapped are covered under Section 504 of the Rehabilitation Act. . . . OCR has established expedited complaint procedures to immediately respond to complaints involving allegations of discrimination against individuals with life threatening illnesses or emergency conditions. . . . To file a complaint, you or your authorized representative should provide the following information in writing: your name and address; how, why, and when you believe you were discriminated against; the name and address of the institution or organization that discriminated against you; and any other relevant information you have. Send the information to: Charlotte Irons, Acting Regional Manager, Office for Civil Rights, Department of Health and Human Services, 300 South Wacker Drive, 33rd Floor, Chicago, Illinois 60606, (312) 886-2359, (312) 353-5693 TDD/TTY. . . . Under Section 504, you also have the right to consult a private attorney and to seek relief through the filing of a private lawsuit against the organization that you allege discriminated against you.

Letter from P. Lucas to R. Rivera (Jan. 6, 1988).

177. *Department of Health and Human Services v. Charlotte Memorial Hosp.*, No. 04-84-3096. The complaint was filed on July 9, 1984. The Office for Civil Rights finding of discrimination was mailed August 5, 1986, six months after the complainant's death, and more than two years after the complaint was filed with the Department of Health and Human Services. *First Bias Found that AIDS is Handicap Under Vocational Act*, 24 Gov't Empl. Rel. Rep. (BNA) 1112 (Aug. 18, 1986).

178. 8A Lab. Rel. Rep. (BNA) 451:201-06 (Mar. 1988) lists a directory of all state and local fair employment practice agencies.

179. AIDS PRACTICE MANUAL, *supra* note 44, at App. III.

situations. Often the filing of such a state claim, which obviously falls short of filing a lawsuit, can bring about a settlement acceptable to the PWA.

At the time of this writing, the law is relatively clear that in most situations AIDS will constitute a "handicap" for purposes of statutory discrimination protection.¹⁸⁰ The issue of HIV seropositivity is less clear. Many experts believe that seropositivity itself can be considered a "handicap": the immune system of a HIV seropositive person is impaired, and if one is fired the impairment has thus affected a "major life function" (namely working).¹⁸¹ This combination would, in their opinion, satisfy the statute. Other experts believe that if the statute or its regulations prohibit discrimination against persons "perceived or regarded as handicapped," then HIV seropositive persons would also be covered because any discrimination against them on the basis of their infection would be because they were perceived as having AIDS.¹⁸² A few lower courts support this position; however, precedent is limited at the moment.¹⁸³ Given this background, the lawyer should proceed as if seropositivity were a handicap.¹⁸⁴

Attorneys contemplating the use of handicap law to protect their PWA clients have two further hurdles to jump. First, to be protected under state or federal handicap law, being handicapped is not enough; the client must also be "otherwise qualified"—that is, he must be able to do his job.¹⁸⁵ This factor can be modified if it can be shown that the person can do the job if the employer makes a reasonable accommodation.¹⁸⁶ For example, in the case of a PWA, working shorter hours or working at home might be considered reasonable accommodations.

If neither state handicap law nor the federal statute applies, you are basically back to a standard wrongful discharge case. I have been constantly taken aback with how many lay people absolutely believe that under the Constitution they have a right

180. AIDS LEGAL GUIDE, *supra* note 44, at § 2-3; C. RITCHIE, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § F-3 (1988).

181. Note, *Asymptomatic Infection With the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 565, 573 (1988).

182. Leonard, *supra* note 15, at 26-27; Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 691 (1985); Fagot-Diaz, *Employment Discrimination Against AIDS Victims: Rights and Remedies Available Under the Federal Rehabilitation Act of 1973*, LAB. L.J. 148, 152 (1988); Wasson, *supra* note 162, at 240-41.

183. See *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987); *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 54 (D.C. 1987); *Doe v. Centinela Hosp.*, No. CV87-02514 (C.D. Cal. June 30, 1988) (denial of summary judgment), (*See Asymptomatic Carrier is Handicapped Under Rehabilitation Act, Judge Says*, 3 AIDS Pol'y & L. (BNA) No. 13, at 1 (July 13, 1988)); *Woner v. Hendrick's Medical Center*, HHS Docket No. 0682002 (filed Feb. 1986). Cf. *Micro Switch v. Human Rights Comm'n*, 164 Ill. App. 3d 582, 587, 517 N.E.2d 587, 590 (1987) (Illinois Human Rights Commission has power to rule on perceived disabilities; not an AIDS case).

184. The enactment of the Civil Rights Restoration Act of 1988 has strengthened the proposition that "asymptomatic individuals who are infected with the human immunodeficiency virus (HIV) are included in the coverage of the Rehabilitation Act of 1973." See *supra* note 154. This Act refers to "contagious disease or infection" (emphasis added). The addition of the word "infection" is seen as crucial. C. Feldblum, *Civil Rights Restoration Act of 1988 Coverage of Contagious Diseases Under Section 504 3* (1988) (position paper prepared for the American Civil Liberties Union Foundation as an AIDS and Civil Liberties Project).

185. Annotation, *Who is "Qualified" Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973* (29 USCS §§ 701 et seq.) and *Regulations Promulgated Thereunder*, 80 A.L.R. Fed. 830, 835 (1986).

186. *School Board of Nassau County, Fla. v. Arline*, 470 U.S. 273, 287-89 nn.17 & 19 (1987). See also Note, *Reasonable Accommodation of the Handicapped Federal Employee: Extending the Legal Duty of the Employer*; Ignacio v. United States Postal Serv., 10 GEO. MASON U.L. REV. 267 (1987).

to keep their job "as long as they are doing it." The doctrine of employment at will¹⁸⁷ comes as a distinct shock. You may be able to keep out of that briarpatch if your client belongs to a union. If the client is under a union contract, most likely he cannot be fired except for "just cause."¹⁸⁸ Moreover, the union must represent him or risk an unfair labor practice charge under the Labor Management Relations Act.¹⁸⁹ Given the medical knowledge about the transmission of AIDS, firing a person because he has AIDS will not meet the just cause standard.¹⁹⁰ At the outbreak of the epidemic, American unions seemed to feel caught between a rock and a hard place because they represented both the AIDS-stricken employee and his terrified co-workers. By 1988, most major unions understand that the risks of workplace transmission are nil, and they have issued national policies in favor of keeping those who are able to work on the job.¹⁹¹ While local unions may suffer from fear, homophobia, or both, the national union will be helpful in making sure a grievance is carried forward properly. In general, grievances heard by arbitrators take much less time than court suits heard by judges. Arbitrators' remedies are also enforced in a more timely manner and seldom appealed. Moreover, use of the grievance system is cost-free to the employee. If neither state nor federal handicap law is applicable, you have found yourself in the

187. Employment at will is the traditional common law doctrine governing the employment relationship.

At common law, absent a statutory prohibition, an employer had virtually unfettered control in selecting its employees. The employer could hire or refuse to hire any person for any reason or no reason at all. This right included the right to refuse to hire an individual because of the employer's opinion that the prospective employee was physically incapable of performing the job. Once hired, the employee could be fired "at will" by the employer for any reason or no reason at all, and, again, this included the employer's belief that the employee could no longer perform the job because of his or her physical condition.

M. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* 81 (1984) (endnotes omitted).

188. Union contracts typically contain provisions protecting union members from at-will termination.

... [I]t is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious cause," or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or, perhaps, more properly as part of a new body of common law of "Management and labor under collective bargaining agreements." They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.

Worthington Corp., 24 Lab. Arb. (BNA) 1, 6-7 (1955), *quoted in* F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 652-53 (4th ed. 1985).

189. 29 U.S.C. § 185 (1982). A discriminatory refusal by a union to pursue a grievance may be grounds for a suit against the union and employer for violation of the union's duty of fair representation.

190. *See* W. BANTA, *AIDS IN THE WORKPLACE* 87-91 (1988).

191. *See* AIDS Resolution Nos. 199, 234 (by the Resolution Committee of the AFL-CIO, submitted and approved at the 30th Biennial Convention, Oct. 28-31, 1985). *See also Unions Face Conflicting Obligations Over AIDS*, 1 AIDS Pol'y & L. (BNA) No. 19, at 5 (Oct. 8, 1986); *Federal Workers' Union Sets Workplace AIDS Guidelines*, 2 AIDS Pol'y & L. (BNA) No. 26, at 5 (Jan. 13, 1988). However, unions such as the American Federation of State, County, and Municipal Employees (AFSCME), which represents 300,000 hospital and health care workers and 50,000 correctional institution employees, are also pushing hard to insure that employers provide detailed guidelines and protective equipment for preventing transmission of AIDS to health care workers. *AFSCME Issues AIDS Guidelines for Health Care, Prison Workers*, 24 Gov't Empl. Rel. Rep. (BNA) 141 (Feb. 3, 1986).

middle of a wrongful discharge suit, which will be highly dependent on whether your state has created exceptions to the employment at will doctrine.¹⁹²

If none of these avenues appears fruitful, more esoteric avenues must be explored. An action under ERISA¹⁹³ may be possible. ERISA forbids employers under its jurisdiction from firing people because they fear large benefit costs (for example, high health insurance payouts).¹⁹⁴ Often in employment cases a breach of confidence may have occurred or, perhaps, defamation or slander.¹⁹⁵ Consider a tort action if a contract action will not work. The manner of treatment of the employee may constitute intentional infliction of emotional harm,¹⁹⁶ and this cause of action is available in some state jurisdictions.

Once you have figured out a potential cause of action, the next question is how does your client wish to proceed. As indicated above, many PWA's are reluctant, for a variety of reasons, to pursue a lawsuit. In situations such as the second and third employment scenarios outlined earlier, lawyers representing PWA's have met, at the request of the employee-PWA, with representatives of the employer for the express purpose of persuading and educating the employer. Often the attorney will take with her a medical person familiar with AIDS issues (doctors for societal reasons impress employers more than other medical professionals who deal with AIDS), a social worker with knowledge of the psychosocial aspects of AIDS, and perhaps a representative of the local AIDS task force. The group must first get the employer's attention through a brief discussion of a potential lawsuit with the employer being on the losing side, using "the majesty of the law." For example, in Ohio we take a copy of the opinion of the Ohio Civil Rights Commission declaring AIDS a handicap. I often take a copy of the American Management Association's booklet on AIDS (obviously not a publication of a knee jerk civil rights organization).¹⁹⁷ Once the employer's attention is gained, the doctor and the social worker should educate the employer on the lack of risk of transmission and the social consequences of the employer's actions. Often the local task force member offers free in-servicing for the employer's workforce. Then, if the PWA has authorized the move, the lawyer offers a face-saving way to return the employee to work with appropriate in-servicing and counseling.

Many large well-known national employers (for example, Sears, IBM, and

192. See Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4th 544 (1982); Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R.4th 120 (1984); Hill, "Wrongful Discharge" and the Derogation of the At-Will Employment Doctrine, *The Employment-At-Will Reporter*, New England Legal Publishers, P.O. Box 48, Boston, MA 02101, (617) 891-6200; AM. B. ASSOC., LABOR & EMPL. L. SECTION, *EMPLOYMENT-AT-WILL ON TRIAL* (1987); *EMPLOYMENT-AT-WILL: A 1986 STATE-BY-STATE SURVEY* (D. Cathcart & M. Dichter eds. 1987).

193. See *supra* note 124.

194. See *supra* note 125 and accompanying text.

195. See, e.g., *Saxton v. Vanzant*, No. 86-CIV-59 (Ohio C.P. Ct. settled June 1986).

196. See Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 308-10 (1987).

197. AIDS, *THE NEW WORKPLACE ISSUES* (1988) (available to AMA members for \$13.50 and to nonmembers for \$15.00 through AMA Membership Publications Division, 135 West 50th St., New York, NY 10020).

AT&T) now have stated policies protecting people with AIDS in their workforce.¹⁹⁸ Providing the employer with these statements and policies is often helpful.

If private persuasion does not work for your client, you may still accomplish reinstatement under the auspices of the state commission which enforces the state handicap law. A filing with this commission often triggers an investigation which includes a mediation-conciliation process. Filing with the state agency is still short of filing a lawsuit if the client is leery of litigation.

Giving advice to a seropositive person who has yet to experience problems in the workplace is a difficult task for a lawyer trained to look for litigative solutions. Often employees want to know whether to tell various people in the workforce of their seropositivity. My usual advice is that as long as neither sex¹⁹⁹ nor sharing needles is part of the employee's job, he has no duty to inform anyone of his private health status. (This question becomes a tight question in my mind when the employee's job involves invasive surgery; in theory, if the institution is following universal precautions of infection control,²⁰⁰ it is questionable even in this case whether any duty arises.²⁰¹) Moreover, I caution about sharing the information with anyone on the job; a supervisor has no fiduciary relationship to the employee and is bound by no privilege. I suggest that the employee attempt to control the release of the information when the issue can no longer be kept secret. First, he should investigate whether his employer has already promulgated a policy on AIDS. Second, he should obtain all relevant information from his employer on such areas as disability leave and sickness benefits before the issue arises. Third, he may wish to raise the issue himself at an appropriate level of management by scheduling an informational meeting similar to the third employment scenario described above. By preventing employer surprise and controlling the information that reaches the employer, the PWA may be able to avoid work place problems.

Employees worry that their health status will become a public issue when the personnel department processes various medical claims. Some employees who are HIV seropositive pay for their T-4 helper cell function tests²⁰² personally rather than

198. See Kramon, *Corporations Join Efforts on AIDS*, N.Y. Times, Mar. 22, 1988, at 428 (Allstate Insurance Co. hosted forum which resulted in the book AIDS: CORPORATE AMERICA RESPONDS); *OPM Prohibits Bias, Allows Discipline of Co-Workers in Governmentwide Policy*, 26 Gov't Empl. Rel. Rep. (BNA) 461 (Mar. 28, 1988); 'AIDS Workplace Principles' Embraced by IBM, AT&T and Others, AIDS LITIGATION REP. 501 (Feb. 26, 1988); *AIDS Information Sheet—Levi Strauss & Co.*, 1 Empl. Testing No. 21, at 135 (Dec. 15, 1987); ADVOCATE, June 23, 1987, at 24 (National Gay Rights Advocates conducted survey during Winter 1986-87 of 995 of Fortune 1000 corporations. One hundred and sixty-four responded. Copies of NGRAs report can be obtained for \$15 from NGRA, 540 Castro Street, San Francisco, CA 94114.).

199. The obvious exception is prostitution, where sex is part of the job. In Nevada, where prostitution is legal, prostitutes are tested on a monthly basis. *Infection Not Reported Among Legal Prostitutes*, 2 AIDS Pol'y & L. (BNA) No. 22, at 2 (Nov. 18, 1987). The real problem arises among illegal prostitutes, where testing is impossible.

200. Update: *Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Bloodborne Pathogens in Health Care Settings*, 37 MORBIDITY AND MORTALITY WEEKLY REP. 377 (June 24, 1988).

201. See *AHA Guidelines Say AIDS Screening is Unnecessary*, 24 Gov't Empl. Rel. Rep. (BNA) 217 (Feb. 17, 1986) (AHA guidelines suggest infected hospital personnel take precautions such as double gloving. "Otherwise, infected health care workers need not be restricted from work 'unless they have evidence of other infections or illness for which any hospital personnel should be restricted'. . . .").

202. "One salient feature of AIDS is an abnormality of the T-Lymphocyte population, manifested by a reduced T-helper to T-suppressor cell ratio. Surveys of asymptomatic homosexual males have shown a high prevalence of T-cell

have that test pass through a benefits department which might recognize its significance and cause gossip. The employee usually pays for medical items until the costs become prohibitive, usually when AZT²⁰³ is prescribed. Some employees have kept this medical treatment secret by enrolling, when possible, in a research protocol which provides the medicine free of charge.²⁰⁴

In sum, the best advice is for the PWA and his attorney to have thorough knowledge of his employer's rules and regulations and for the PWA to control the release of information at his discretion and in his preferred language and context. This advice does not guarantee a hassle-free environment but may give the client more control over the situation.

C. Divorce and Custody

For many, a section on divorce and custody issues in an article about representing gay and bisexual men with AIDS may seem an anomaly. However, the issues are very real. The Centers for Disease Control (CDC) has delineated men who have had sex with other men as one of the major risk groups.²⁰⁵ The popular shorthand is to label all these persons as "homosexuals."²⁰⁶ Since the CDC uses only one category to describe these persons, namely gay and bisexual men, the true proportion of these men who are bisexuals is unknown.²⁰⁷ However, Kinsey statistics give some insight when we note that thirty percent of all American men have had male to male sex to orgasm after puberty.²⁰⁸ Laud Humphreys in his groundbreaking study of St. Louis tearooms found that fifty-four percent of all men who habitually

abnormalities." Kreiss, Kasper, Fahey, Weaver, Visscher, Stewart & Lawrence, *Nontransmission of T-cell Subset Abnormalities from Hemophiliacs to Their Spouses*, 251 J. A.M.A. 1450 (1984). T-4 helper cells are essential to the immune system. Thus, monitoring the T-4 helper cell level is important in HIV positive persons to determine the amount of immunosuppression. Siegal, *The Immune Deficiency of AIDS*, in AIDS AND OTHER MANIFESTATIONS, *supra* note 15, at 305.

203. Azidothymidine (AZT) is an FDA-approved drug for AIDS which has been shown to decrease the mortality rate and reduce the likelihood of opportunistic infections for those taking the drug. It also helps boost the number of T-cells. However, the drug can have serious side effects. ADVOCATE, Sept. 1, 1987, at 23. The most significant problem, though, is the cost. "A bottle of 100 AZT tablets costs \$184.99 at a pharmacy. It will have to be replenished in eight to 12 days. . . . Yet thousands clamor for a prescription—making AZT not only one of the most expensive medicines in history but also one of the most profitable." Weber, *Business Booms in AIDS Markets*, Health Week, May 23, 1988, at 17.

204. See *Ohio State Will Test New Drugs On AIDS*, Columbus Dispatch, Oct. 2, 1987, at A-1 (The Ohio State University to receive \$7 million in federal grants to test new drugs); *Clinical Trials of Drugs to Begin, Government Says*, 1 AIDS Pol'y & L. (BNA) No. 12, at 5 (July 2, 1986) (contracts to conduct clinical trials of experimental drugs awarded to 14 medical centers).

205. The CDC has reported that 62% of adult cases have occurred in sexually active homosexual and bisexual men. CDC, AIDS WEEKLY SURVEILLANCE REP., June 6, 1988.

206. The problem with such a label is that the approximately 20 million gay persons in the United States are not a homogenous group. "The attempt to categorize all humanity into two mutually exclusive and contrasting groups of homosexuals and heterosexuals, a form of 'them' and 'us,' besides being ethically and politically dubious, produces misleading over-simplifications." D. WEST, *HOMOSEXUALITY RE-EXAMINED* 1 (1977). Even the simple definition of a person who engages in same gender sex proves useless. Do we label a person "a homosexual" if he or she behaves in this manner once? Twice? How often does same sex behavior have to occur for the actor to earn this label? Does it matter when one engages in this type of conduct? During puberty? While heterosexually married? Is a person who announces his or her status but never engages in any same-sex sexual behavior considered "a homosexual"? Given these variants, the label is arbitrary and misleading.

207. Kinsey concluded that "18 percent of the males [in the study] have at least as much of the homosexual as the heterosexual in their histories . . . for at least three years between the ages of 16 and 55. This is more than one in six of the white male population." A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650 (1948).

208. *Id.*

used public rest areas for sex were married men with children.²⁰⁹ Suffice it to say, married men who have AIDS or who are HIV seropositive are likely to become clients. For these men, a divorce may be in their immediate future, and, concomitant to the divorce, child custody issues often arise. However, custody issues also arise for gay fathers previously divorced who find their custody or visitation rights challenged on a new basis, namely HIV seropositivity or AIDS.

In the case of a divorce, AIDS impacts a number of the legal decisions. In most states, fault is no longer an issue; grounds for divorce can be found without resort to traditional fault grounds.²¹⁰ However, a wife confronted with not only adultery, but also same sex adultery and the potential of having been infected with a fatal disease, may be unlikely to choose the most amicable method of marriage termination. In one case, the wife brought a separate suit claiming that knowledge of her husband's bisexuality and his infection with HIV had caused her severe emotional harm.²¹¹ Since many jurisdictions have abolished interspousal immunity,²¹² the prospect of tort actions by wives against husbands in such cases seems likely. The question of AIDS also affects the financial settlement. If the husband is seropositive or has AIDS, the settlement for the spouse and especially the children must take into account the fact that the husband and father's potential life span has been considerably shortened.²¹³

Furthermore, the noninfected spouse may raise the question of whether the infected spouse should have custody or even normal visitation rights. The issues of child custody and visitation then enter an arena already fraught with legal complexity. Gay men and lesbians have been fighting for the past twenty-five years to have custody and visitation with their children.²¹⁴ Courts in many areas of the United States still prohibit custody and limit visitation based solely on the sexual orientation

209. L. HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 105 (1975). Humphreys defines a tearoom as a public restroom that has gained "a reputation as a place where homosexual encounters occur. Presumably, any restroom could qualify for this distinction, but comparatively few are singled out for this function at any one time." *Id.* at 2. Many of the persons arrested in public-sex areas are well known and respected in their community: a popular local television weather forecaster in Sacramento, California; a city council member in Jessup, Georgia; a superintendent of schools in Post Falls, Idaho; a Roman Catholic priest in New Orleans, Louisiana; and a police dispatcher in Laurel, Maryland. Harding, *Public Sex*, *ADVOCATE*, Aug. 16, 1988, at 10.

210. H. CLARK, *DOMESTIC RELATIONS CASES AND PROBLEMS* 813-15 (3d ed. 1980).

211. *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987). A bisexual husband, fearing he might have been exposed to the HIV virus, had himself tested. He tested negative. He then told his wife of his sexual activities and his negative test results. She sued, claiming she had developed "AIDS-phobia"—a fear that she may have been exposed. In dismissing, Justice Rigler stated:

To allow this claim to stand would amount to the opening of Pandora's Box. If this cause of action were permitted to continue, any party to a matrimonial action who alleged adultery would now have a separate tort action for damages for "AIDS-phobia" because unfortunately in this day and age any deviation from the marital nest could possibly result in exposure to AIDS. Certainly any claim that a spouse interacted with a prostitute would, under plaintiff's view, be grounds for damages separate from equitable distribution. Any person who had a blood transfusion within the last eight years would have to disclose this fact to their prospective or current spouse or risk a damages actions for "AIDS-phobia" since such a transfusion may have resulted in an exposure to the AIDS virus. The law can be stretched only so far.

Id. at 598.

212. See generally Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3d 901 (1979).

213. *AIDS and Divorce: A New Legal Arena*, N.Y. Times, Sept. 21, 1987, at Y-23 (nat'l ed.).

214. See Rivera I, *supra* note 36, at 883-904; Rivera II, *supra* note 36, at 327-36; Rivera III(2), *supra* note 36, at 327-71.

of a parent.²¹⁵ Moreover, parents who consider themselves "bisexuals" will find that courts treat them as "homosexuals" for purposes of child custody and visitation.²¹⁶ Non-gay spouses may also attempt to force their gay ex-spouses to have the HIV test, claiming that the former spouse is infected and hence presents a danger to the children.²¹⁷

Court cases have already resulted when gay parents who have previously won visitation rights with their children now find themselves attacked on the AIDS issue.²¹⁸ In a small Ohio town, a lesbian mother was given an oral order from the bench that on her visitation days she could not take her children to her home if her life partner was there because the children might catch AIDS.²¹⁹ Since lesbians are, as a group, the least likely persons to catch AIDS,²²⁰ the irrationality and homophobia inherent in the order are manifest.

In the cases litigated to date, most PWA's or seropositive parents have won their battles to retain visitation rights regardless of their HIV status.²²¹ Moreover, gay

215. Missouri courts, in particular, evidence a hostile attitude toward gays and the issue of custody. In *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. App. 1980), a father was granted a change of custody from the lesbian mother because she had not abided by harsh restrictions that forbade her to continue her relationship with her "friend." The appellate court analogized the restrictions on the mother's friend to restrictions on a "habitual criminal, . . . sexual pervert, or a known drug pusher." *Id.* at 183. *L. v. D.*, 630 S.W.2d 240, 241 (Mo. App. 1982), involved a lesbian who sought a change of custody from the father to herself. Not only was she denied custody, but new restrictions were added to her visitation rights. Gay fathers have fared no better in Missouri. In *J.L.P.(H) v. D.J.P.*, 643 S.W.2d 865, 866 (Mo. App. 1982), the father was labeled an "avowed homosexual" and was given restricted visitation. *See also S.L.H. v. D.B.H.*, 745 S.W.2d 848 (Mo. App. 1988); *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. App. 1987); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. 1987).

216. *Cf. Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963) (court considers a married father who engaged in same sex behavior in his late teens "a homosexual").

217. *See, e.g., Doe v. Doe*, No. 77D 5040 (Ill. Cir. Ct. stipulation entered Mar. 31, 1987) (ex-wife obtained court order requiring gay father to undergo HIV antibody test; order was subsequently vacated; ex-wife then agreed to a settlement granting visitation after reviewing medical evidence that father would represent no real danger to children, 17 AIDS Update (Lambda Legal Defense), at 4 (Apr. 1, 1987)); *Doe v. Roe*, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988) (AIDS testing may not be required of custodial father at request of grandparents who are seeking custody); *In re Smalley*, No. 83-112 (Ohio Dom. Rel. Ct. Dec. 1986) (court denied request for order forcing a gay father to submit to HIV antibody testing as condition for visitation).

218. *See, e.g., Stewart v. Stewart*, 521 N.E.2d 956 (Ind. App. 1988) (state court of appeals reversed and remanded superior court's complete termination of visitation rights of HIV seropositive father); *Doe v. Doe*, No. 77D 5040 (Ill. Cir. Ct. stipulation entered Mar. 31, 1987) (father awarded overnight visitation in 1978; in 1983 ex-wife discovered he was gay and obtained a court order requiring HIV antibody testing before visitation would be reinstated; order was vacated and the wife agreed to a settlement granting visitation); *Doe v. Roe*, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988) (court refused to order testing of father who claimed to have AIDS; father's former in-laws sought the testing as part of a dispute over custody of his two children); *In re Smalley*, No. 83-112 (Ohio Dom. Rel. Ct. 1986) (father granted visitation in 1983 divorce decree; in 1986, he sued his ex-wife for refusing visitation unless he took an HIV antibody test; court refused to order the father to submit to the test).

219. The author was consulted by a lesbian mother from a rural county near Columbus, Ohio. Under her divorce decree, she was awarded limited visitation rights with her two children. In 1986 at a show cause hearing on another issue, the judge sua sponte told the mother that she could not take the children into her home where she lived with her life partner because of "the danger of AIDS." For many months, the visitation hours were spent at shopping malls. The author cannot, because of continuing issues, reveal the names of the parties.

220. Women have accounted for only 7% of the AIDS cases in the United States. Further, 52% of those cases are among intravenous drug users. *AIDS Perceived "Gay Men's Disease,"* 1 AIDS Pol'y & L. (BNA) No. 20, at 6 (Oct. 22, 1986). There have been at least three reported cases of sexual transmission of HIV between women. However, "lesbian sex is not a major route for transmission. Being a lesbian is not a risk factor in itself. . . ." Interview with Ruth Schwartz, Educational Events Coordinator of the San Francisco AIDS Foundation, in *National Lawyers Guild AIDS Network, THE EXCHANGE*, Mar. 1988, at 1.

221. *See supra* note 218. *See also "Jane" W. v. "John" W.*, 137 Misc. 2d 24, 519 N.Y.S.2d 603 (N.Y. Sup. Ct. 1987) (father with AIDS granted unsupervised visitation with daughter); *Judge Restores Custody to Man with AIDS*, Washington Blade, May 13, 1988, at 1 (PWA allowed to resume joint "physical custody" of son).

fathers have successfully thwarted attempts to force them to be tested for HIV as a condition of visitation or custody.²²² However, these battles have been costly in terms of both money and emotions.

If your client requires protection of either visitation or custodial rights or protection from invasive testing orders, general rule no. 1, given many pages ago, will pay off: You must know your AIDS medicine. The process of winning the case involves educating the court about AIDS. Expert witnesses must be used to convince the court that AIDS is not casually contracted and that the risk to a child living with or visiting a seropositive parent is infinitesimal. Two kinds of witnesses are preferable: a high ranking medical person from the state or city department of health and a doctor who is a specialist in infectious diseases. A doctor who works with PWA's every day and who has children himself is especially effective. These witnesses need to be familiar with what are known as the "household studies."²²³ These studies show that hundreds of persons have lived with PWA's sharing bathrooms, kitchens, and normal everyday living without becoming infected. The education of the court is crucial; lawyers tend to forget that a judge's knowledge of AIDS may be confined to the same newspapers as the general public.²²⁴

If the issue is AIDS testing, education of the court is again necessary. Few lay people truly understand that no test for AIDS exists. The tests used have high probabilities of false positives and false negatives in certain circumstances, the tests are for antibodies not antigens, and a positive test says nothing by itself about the health of the person tested. In any event, education about the test must always be followed by the fact that even if the person involved were seropositive or in fact had AIDS he presents no danger to his children.

Education of the court is the first goal of the litigator representing the gay or bisexual parent. However, the litigator must be aware that AIDS may not be the real issue. In some cases, the attacking parent may be genuinely fearful for the health of the children; however, in other cases, the AIDS issue may be a surrogate for the issue of homosexuality. Charges of homosexuality have been a very successful method of winning custody cases. Once the AIDS issue is raised, the attorney representing the gay or bisexual parent should make every attempt before trial to provide the other side with information in order to reassure the other parent as to the safety of the

222. See *supra* note 217.

223. See *supra* note 17.

224. In *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. App. 1988), an Indiana custody case, Marion Superior Court Judge Richard Milan refused to grant custody to an HIV seropositive father, and instead terminated visitation rights. Judge Milan's justification was that "[e]ven if there was a one percent chance that this child is going to contract [AIDS] from him, I'm not going to expose her to it." *Denial of Visitation Rights Overturned by Indiana Court*, 3 AIDS Pol'y & L. (BNA) No. 10, at 2 (June 1, 1988). Judge Milan reached his decision after having excluded all expert testimony on the father's behalf. *Father with HIV Appeals Denial of Visitation Rights*, 2 AIDS Pol'y & L. (BNA) No. 9, at 6 (May 20, 1987). In remanding the case, the Fourth District Court of Appeals ruled that "[a]n examination of the medical evidence leads to but one conclusion: the medical evidence and studies available at the time of the trial showed that AIDS is not transmitted through everyday household contact." *Id.* Dissenting Judge Conover, not wanting to abandon his AIDS-fears in light of the medical testimony, argued that "it is theoretically possible for a parent to infect a child with the AIDS virus while extracting a child's tooth. Under these circumstances a parent *might* infect his child with AIDS." *Id.* (emphasis in original).

children.²²⁵ If that information is totally rejected and the level of attack continues unabated, the attorney should suspect another, hidden agenda. If in effect the attorney is about to try a gay custody case, the preparation becomes absolutely crucial. Trying a gay custody case has become an art and is beyond the scope of this Article. Moreover, excellent literature is available on the subject.²²⁶ If the parent involved in an AIDS case is gay or bisexual, sexuality issues are undoubtedly present, and the conscientious advocate must prepare those issues as well.

Custody cases traditionally focus almost entirely on factors presumably relevant to the "best interests of the child."²²⁷ Domestic relations courts have been loathe to entertain constitutional issues in making their decisions.²²⁸ Yet if the issue is mandating testing for one of the parents, constitutional protections and issues are at the core of the case.²²⁹ The attorney must recognize the long standing reluctance of domestic courts to delve into such issues and the strong possibility that the court will need rigorous and informative briefs in order to be aware of the importance of these issues. At the bottom line, constitutional issues notwithstanding, the attorney must convince the court that HIV testing of a parent is basically irrelevant to the best interests of the child.

III. FINAL WORDS

The issues in the foregoing pages do not exhaust the legal issues of AIDS which confront attorneys. In the past four years, I have obtained the parole of a prisoner with AIDS, advised military personnel who tested HIV seropositive, and worked with aliens who were required to be HIV tested. All of these areas—prisons,²³⁰ the

225. In *Doe v. Doe*, No. 77D 5040 (Ill. Cir. Ct. stipulation entered Mar. 31, 1987), an ex-wife tried to make the gay father undergo HIV antibody testing as a condition to visitation. The wife settled after she was given medical information and was assured that, even if the father did have AIDS, the children were in no real danger. 17 AIDS Update (Lambda Legal Defense), at 4 (Apr. 1987).

226. See, e.g., SEXUAL ORIENTATION LAW, *supra* note 39; D. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (1982) (available from the Lesbian Rights Project, 1370 Mission St., 4th floor, San Francisco, CA 94103); HITCHENS & PRICE, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U.L. REV. 451 (1978-79); POLIKOFF, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 REV. L. & SOC. CHANGE 907 (1986).

227. The "best interest of the child" theory was originally advanced by Justice Cardozo, who observed that "[t]he judge] is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. . . . Equity does not concern itself with such disputes. . . . Its concern is for the child." *Finlay v. Finlay*, 240 N.Y. 429, 434, 148 N.E. 624, 626 (1925). However, the gap between theory and practice is great and the "morality" of the parents is often at issue. *E.g.*, *Bunim v. Bunim*, 298 N.Y. 391, 83 N.E.2d 848 (1949). The Ohio Revised Code provides the following "relevant factors" to be considered in determining the best interest of the child:

(1) The wishes of the child's parents regarding his custody; (2) The wishes of the child regarding his custody if he is eleven years of age or older; (3) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interests; (4) The child's adjustment to his home, school, and community; (5) The mental and physical health of all persons involved in the situation.

OHIO REV. CODE ANN. § 3109.04(C) (Anderson 1972 & Supp. 1978).

228. See *Rivera III*(2), *supra* note 36, at 329.

229. See Comment, *supra* note 10; Note, *supra* note 10.

230. See *Parole Officers Help Clients With AIDS Face the Short Term*, N.Y. Times, Feb. 4, 1988, at 12 (nat'l ed.). In this article, the author describes how parole officers have to change their "roles" dealing with parolees who will not live long after leaving prison.

military,²³¹ and immigration²³²—are special areas affected by AIDS. In addition to serving as a lawyer for persons with AIDS or who are seropositive, I have been drawn into the field of AIDS education, and have made numerous presentations and speeches on the legal ramifications of AIDS. Universities and businesses have consulted me on policies and procedures affecting their workplaces. This panoply of AIDS legal work is a common experience of lawyers who become involved with AIDS issues.²³³ My intention has not been to cover all of these issues in this Article. The issues discussed give a sufficient vision of AIDS legal work. The general rules given at the beginning of this Article hold as general advice for all the other areas not discussed. Even as this Article goes to print, excellent legal scholars and attorneys are turning their talents to writing substantive works which will help the practitioner face the many challenges of AIDS.

Afterword: AIDS Burnout

For many lawyers engaged in the types of AIDS work described above, one other salient issue remains to be discussed: AIDS burnout. This phenomenon was most recently highlighted when Mark Senak, a founding member of the *pro bono* legal group working with the Gay Men's Health Crisis, announced that he was leaving AIDS work, at least temporarily.²³⁴ When Mauro Montoya, former legal director of the Whitman Walker Clinic in Washington, made a similar announcement, he noted that he personally knew 900 persons who had died as a result of AIDS.²³⁵ Burnout is not a new phenomenon to any lawyer doing public or *pro bono* work.²³⁶ Legal aid lawyers have burned out at a regular rate for many years. No competition should arise as to which type of burnout is the worst. Nonetheless, the context of AIDS burnout deserves some comment. Seldom does a lawyer or any one person know 900 people who have died, except during a war or a disaster.

Most United States citizens are not involved in the AIDS fight; most are unaware that toiling next to them are thousands of people embroiled in a never ending gigantic struggle. Most people and most lawyers are uninvolved because of the "otherness" of the PWA's. Gay and bisexual men, intravenous drug users, poor blacks, and hispanic women represent "the other" to most Americans and to an even greater majority of American lawyers. Not enough so-called "innocent victims,"

231. See Military Law Task Force, *Are You in the Military? Are You Worried About the "AIDS" Test?*, which is a fact sheet advising military personnel on AIDS testing and on the need for civilian legal counsel. Available from Military Law Task Force, P.O. Box 33544, San Diego, CA 92103, (619) 233-1701 (copy on file with the Ohio State University Law Journal). See also National Lawyers Guild Military Law Task Force, *Military Policy on A.I.D.S. and H.T.L.V.-III Testing*, ON WATCH, Apr. 1986, at 1-5.

232. See S. Loue, *Representing HIV-Positive Clients*, IMMIGRATION JOURNAL 10-12 (Jan.-Mar. 1988).

233. Friedman, *The AIDS Crisis: A Well-Defined Role For Lawyers*, The Washington Law., Nov./Dec. 1987, at 60-61.

234. See Senak & Reidinger, *When Your Client Has AIDS*, 74 A.B.A. J. 76 (July 1, 1988).

235. Kastor, *Advocates in the Realm of Sorrows: The Challenges and Opportunities of Lawyers Who Take AIDS Cases*, The Washington Post, Feb. 23, 1988, at D-1 (final ed.).

236. This article is my burnout monument. Before starting the article, I resigned from four AIDS organizations of which I was either the chair or the legal committee chair. For health and sanity, I pulled back. At this moment, I still take private *pro bono* clients, but I do no organizational AIDS work. I currently represent 30 different persons in various stages of HIV infection with various problems.

hemophiliacs or transfusion cases, exist to have impacted many people. Coupled with "otherness" is the firmly held popular belief that AIDS is a gay disease, a belief that exists notwithstanding the statements to the contrary by public health officials. The stigma of the disease firmly attaches to the workers as well as the afflicted. For example, a non-gay woman who nursed PWA's had to fight a custody case because her ex-husband argued that her work should cause her custody rights to be limited.²³⁷

I wish to avoid the arrogance of universalizing my own experience. Yet, my talks with others lead me to believe that my own experience in the Columbus, Ohio area is common.²³⁸ I am not a poet or a creative writer, and I feel at a loss to adequately describe what has become commonplace and daily for me. On the average, I go to a funeral once a month, or, if I do not attend, I send flowers or make a donation. I am in the hospital on the average of once a week. I see a PWA or HIV seropositive person as a new client probably twice a week. I receive a call from a PWA, an HIV seropositive person, or a loved one on the average of once a day. The complexity of each person's problems is unnerving. Almost never are the issues single; they intermesh and almost always have a psychological or medical component. Truthfully, I never have a complete answer or solution.

Yet, neither the complexity nor frequency makes the cases unique. Two other features seem to set them apart. The American system rests on the premise that each person hires a champion to tilt at the champion of another; the goal is to win. Every lawyer has her share of wins and losses. In AIDS, even the victories are pyrrhic. All your clients are dying and dying soon. Whatever you accomplish is temporary. I helped a prisoner with AIDS to obtain a parole: a victory! Yet the purpose for the parole was to allow him to die in an AIDS residence with a friend at his side rather than to die locked in a room alone as had some of his fellow prisoners. Death always wins. Even though I profess Christianity, the relentless battle with death, death, and death²³⁹ bears down on a daily basis.

The second unique feature of this type of legal work is the intensity. Suicide, funerals, dying, discrimination, harassment, and abandonment continuing every day, unending and relentless, make every interaction intense. Even in speeches and consultations, dealing with the fears of non-PWA's creates a tension and intensity of unique dimensions. As a lawyer, I confess I treasure the days when young couples come to me to discuss having a baby by donor artificial insemination. Even though for the couples I represent (lesbians) having this baby is fraught with complex legal issues, the purpose is life giving.

Conversely, this work has rewarded me with the greatest bonus a profession can give: contact with incredibly wonderful people. No group of clients has ever been as loving and life-giving as the PWA's with whom I work. No group of fellow

237. *Buck v. Grein* (Champaign County, Ill. decision unwritten and not officially reported) described in *Lesbian/Gay Law Notes*, Sept. 1986, at 55. "The decision did not ultimately rest on the AIDS issue, although the Judge did comment, peripherally, that he considered Mr. Grein's initial withholding of visitation to be reasonable." Letter from M. McClellan, the mother's attorney, to R. Rivera (Nov. 20, 1987).

238. See Kastor, *supra* note 235.

239. See D. Margolick, *Dealing with the Details of Death: A Legal Clinic Fills the Void for AIDS Patients*, N.Y. Times, Apr. 22, 1988, at 23 (nat'l ed.).

professionals do I admire as much as I admire the doctors, nurses,²⁴⁰ social workers,²⁴¹ psychologists, and others who do AIDS work as part of their daily vocation. No finer group of people exists (and no more tired).

I offer two pieces of final advice. First, if you do any measure of this work, join a support group for AIDS workers. Many local AIDS task forces provide them. Outsiders do not understand your feelings; you need a place to express your frustrations and concerns.²⁴² Second, every so often, stop and withdraw for a while. AIDS work, unfortunately, will be around for a long while. Take time out to refresh yourself for the longer struggle.

I suspect Mark Senak and Mauro Montoya will both be back.

240. See Winerip, *AIDS Fear: How a Nurse Battles Hers*, N.Y. Times, July 28, 1988, at 12 (nat'l ed.).

241. See Dunkel & Hatfield, *Countertransference Issues in Working with Persons with AIDS*, Soc. WORK 114-17 (Mar.-Apr. 1986).

242. See Schulman, *Remembering Who We Are: AIDS and Law in a Time of Madness*, 3 AIDS & PUBLIC POL'Y J. No. 1, at 75 (Winter 1988).